91-366

No.

Supreme Court, U.S.
FILED
AUG 30 1991
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In The

# Supreme Court of the United States

OCTOBER TERM, 1991

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EDWARD MURTAGH DEMPSEY,

*Petitioner,*

*vs.*

TOWN OF BRIGHTON,
EUGENE SHAW, CHIEF OF POLICE OF THE TOWN OF BRIGHTON,
TOWN OF BRIGHTON POLICE DEPARTMENT,
OFFICERS THOMAS SLEEP, ROBERT E. HICKEY, FRED J. MELLINI, AND SERGEANT WILLIAM LaRONDE, AND DOES 1 THROUGH 6.

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Did the Respondent Sleep act as a reasonable and prudent police officer in stopping, detaining and causing the petitioner to be handcuffed, injured, use of excessive force and defacto arrest, sans reasonable suspicion? (Terry v. Ohio, 392 U.S. 1)

2. Did the District Judge err in determining ultimate facts without passing on the credibility of any party, or the testimony of petitioner's and respondents' experts as to probable cause, excessive force, inter alia, and dismissing the Petitioner's Complaint sua sponte?

3. Is the Brighton Police Dept. and Chief Shaw accountable as respondeat superior due to lack of proper training as to the law of arrest and failure to maintain "Use of Force" records?

## LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the action of EDWARD MURTAGH DEMPSEY vs. TOWN TOWN OF BRIGHTON, et al. are identified in the caption, except John Does 1 through 6, due to the plaintiff Edward Murtagh Dempsey's testimony that there were additional Brighton police officers, whose identity was not disclosed.

Mark Curenton's action was consolidated with the case of Edward Murtagh Dempsey by Order of the Honorable David G. Larimer, U.S. District Judge, dated January 11, 1989 (Docket #12).

The plaintiff Mark S. Curenton did not appeal to the Court of Appeals from the Decision and Order of the Honorable David G. Larimer dated October 29, 1990.

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"SUMMARY JUDGMENT UNDER THE FEDERAL RULES: DEFINING GENUINE RULES OF MATERIAL FACT", 99 Federal Rules Decisions 465.

## JURISDICTIONAL STATEMENT

The Petitioner Edward Murtagh Dempsey and Mark S. Curenton, the plaintiff in the companion action, both brought these actions pursuant to 42 U.S.C. Sections 1981, 1983, 1985 and 1988 for violation of their civil rights by respondents, and pendent state claims for assault, false imprisonment and damages sustained by them. The jurisdiction of the court to review the judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

The transactions out of which the Petitioner commenced his action herein pursuant to 42 U.S.C. Sections 1983, 1985 and 1988, arose after the Monroe Savings Bank Branch in the Town of Brighton was robbed by Franklin Charles Leonard, a black man without an accomplice, at 1:32 P.M. in the afternoon on July 12, 1987. The said Franklin Charles Leonard confessed to robbing the Monroe Savings Bank and was sentenced to ten years in a federal penitentiary by the Honorable Michael Telesca, United States District Judge for the Western District of New York, and is now incarcerated at the Federal Penitentiary at Lompoc, California. Franklin Charles Leonard did not

display a weapon at the time of the Robbery and after taking money from the bank teller, Lisa Fiordeliso Dunn, he fled on foot from the scene of the robbery.

That approximately one hour after the Monroe Savings Bank branch robbery, the Petitioner Edward Murtagh Dempsey, a lifelong resident of the Town of Brighton, left his home and proceeded northwesterly on Monroe Avenue in his dark blue four-door Toyota automobile in the curb lane, in accordance with his daily workday custom. He passed the Monroe Savings Bank branch and at that point a Brighton police car, now known to have been operated by the Respondent Officer Thomas Sleep, drove out from the Monroe Savings Bank branch and followed Edward Murtagh Dempsey in

a northwesterly direction on Monroe Avenue in the passing lane (Dempsey Transcript Pages 341-345) (A-99, A-100). Officer Thomas Sleep is required to wear glasses, and this is stamped on his operator's license (deposition transcript page 374).

On not less than two occasions the Respondent Officer Thomas Sleep pulled astride of Edward Murtagh Dempsey and examined him very carefully. As Edward Murtagh Dempsey approached the intersection of Monroe Avenue and Highland Avenue, he noted that the Plaintiff Mark Curenton was standing on the corner in accordance with his daily custom awaiting Edward Murtagh Dempsey so that they could both proceed to their summer employment at the Weyerhaeuser Lumber Company in

Rochester, New York, during the time when both of them were not attending college. Mark Curenton had just returned from the 7-11 Store which was on Monroe Avenue in the vicinity of Monroe Savings Bank where he bought a sandwich for his lunch. Mark Curenton noted the police activity at the Monroe Savings Bank branch. Mark Curenton was a black man who had a beard and a mustache, was approximately six feet tall and medium build and was wearing a white baseball type shirt with short blue sleeves, and according to the deposition testimony of the Mark Curenton, Edward Murtagh Dempsey and New York State Troopers he was wearing maroon pants and did not have a hat nor was he wearing sunglasses, and was merely standing on the corner awaiting

the arrival of Edward Murtagh Dempsey. Immediately across Highland Avenue at the intersection where Mark Curenton was standing, two New York State Police Troopers, namely, Sgt. Frank Murray and Trooper Kim Smith were on roving patrol and had stopped at the bus turn-around loop at the intersection, and each of them observed Mark Curenton for a span of five to ten minutes while each of them were at the bus turnaround. Each of them had radio communications, including the descriptions from the Brighton police dispatcher of the bank robber, Franklin Charles Leonard, who among other things by the radio dispatcher descriptions had a thin face, thin build, was a black man wearing a hat with chin strap, a jacket and sunglasses; whereas Mark Curenton

was wearing a white baseball type shirt with short blue sleeves, maroon pants, no hat, clear unshaded glasses and physically he was of medium build, approximately six foot tall and had a beard and mustache. Trooper Kim Smith testified in her deposition that she had her "scanner" on and could hear all the radio transmissions from the Brighton Police dispatcher if they were broadcast (Smith deposition page 33) (A-86). Both Sgt. Frank Murray and Trooper Kim Smith testified that they had no reason to stop or question Mark Curenton who was standing at the intersection immediately across the street from the turnaround at what appeared to be the place where a bus stop would be located, but there was no bus stop there (Smith deposition page

16) (A-85). Trooper Kim Smith stated that her attention was drawn to Mark Curenton, because he was wearing clothing of different colors. The location of Mark Curenton while he was awaiting his transportation with the Petitioner Edward Murtagh Dempsey was confirmed by Trooper Kim Smith, Sgt. Frank Murray, Edward Murtagh Dempsey and Mark Curenton.

Officer Thomas Sleep denies that he observed the automobile being driven by Edward Murtagh Dempsey at any time before Mark Curenton got into Edward Murtagh Dempsey's car at the intersection, and he indicated under oath, that the first time he observed Edward Murtagh Dempsey's car was while it was stopped in the curb lane when Officer Thomas Sleep was in the passing lane at

approximately 75 feet or three car lengths back of the Dempsey's car (Sleep deposition page 427, 433 & 436) (A-106, A-107). If Officer Thomas Sleep was testifying truthfully he would have to look through cars in the curb lane which limited his view. He denies that he saw a trooper car at the bus loop (Sleep deposition Page 400), and he claims that Mark Curenton appeared to be coming through some bushes at the intersection (Sleep deposition page 438) (A-107, A-108), and that he only looked at Mark Curenton for a few seconds, which was described as a "fleeting glimpse" by the Respondent Chief of Police Eugene Shaw (Shaw deposition page 218). Officer Thomas Sleep acknowledges that his only source of description was the

Brighton Police Radio Transmission Tape (Exhibit B - Radio Transmission Tape Deposition Exhibit 10 - 11/27/89) (Excerpts APPENDIX C). The accuracy of the transcript of the Brighton Police Radio Transmission Tape was stipulated to by Jane Conrad, Esq., attorney for the Respondents, and also Jane Conrad, Esq., has confirmed that the radio transmission tapes were the sole source of description information for the culprit who robbed the Monroe Savings Bank branch. Officer Thomas Sleep acknowledges that his only basis for picking up Mark Curenton was that he was black, that he had some blue on, that he did not see the bottom half of Mark Curenton (Sleep deposition page 442) (A-110), and he never had a description of a car being involved in

the robbery, nor that the culprit was carrying a bag, but he claims that Mark Curenton appeared to be coming through some bushes, which testimony is neither plausable and is contrary to the testimony of the Petitioner and Mark Curenton, and the two New York State Troopers. Petitioner's photographic exhibits 14, 15, and 16, which are part of the deposition exhibits taken on 3/13/90 and are part of the record. The Respondents acknowledge these exhibits to be fair and reasonable representations, and these photographs show the location of hedges and bushes described by Respondent Officer Thomas Sleep. The Petitioner Edward Murtagh Dempsey employed a Civil Engineer who was prepared to do an engineering study of the intersection, including the

height elevations and the distances of the two foot hedges from the curb, which engineering study the Petitioner and Mark Curenton believe would further butress the Petitioner's conclusions that Officer Thomas Sleep testified untruthfully at his deposition that Mark Curenton appeared to be coming through the bushes. Officer Thomas Sleep further testified that he could only see the top half of Mark Curenton and not the bottom half of Mark Curenton (Sleep deposition page 442) (A-110).

Immediately after the robbery, Officer Thomas Sleep observed Greg Hammer in the City of Rochester, who he also claimed was coming through bushes (deposition transcript page 874) (A-132), who was well known to the

Brighton Police Department. Greg Hammer was a 6'4" black man then wearing combat boots and a woman's dress. In accordance with the communication with Officer Thomas Sleep, Lt. Thomas Voelkl caused Greg Hammer to be picked up and taken back to the Monroe Savings Bank branch for a showup, which was negative. The basis for the pick up by Lt. Thomas Voelkl, was that he was a black man who he thought had the capability of robbing the bank (Voelkl deposition page 888) (A-133). Thereafter, Officer Thomas Sleep attempted to locate two other black men in a grey Crysler K-Car in the City of Rochester, and without requesting backup from the Rochester City Police, he went as far as the intersection of Goodman Street and Monroe Avenue, which is approxi-

mately 1.10 miles northwesterly on Monroe Avenue from the intersection of Monroe Avenue and Highland Avenue. After being unable to locate these two black men, he returned to the Monroe Savings Bank, which he denies, and he also denies that he talked with anyone at Monroe Savings Bank branch as to any involvement of an automobile. The Petitioner Edward Murtagh Dempsey clearly describes the activity of Officer Thomas Sleep before arriving at the intersection, contrary to the deposition statements of Officer Thomas Sleep that he did not notice Edward Murtagh Dempsey's dark blue four-door Toyota before he arrived at the intersection at a point when Mark Curenton was getting into the automobile of Edward Murtagh Dempsey (Sleep

deposition pages 427, 433, 436) (A-106, A-107).

It is reasonable to conclude, in view of the testimony of the two New York State Troopers, Sgt. Frank Murray and Trooper Kim Smith, as well as the photographic exhibits 14, 15 and 16, that Officer Sleep did not testify truthfully for the purpose of articulating reasonable suspicion, that Mark Curenton came through the bushes, and that he never saw Edward Murtagh Dempsey's blue car before it stopped.

At the scene where the Petitioner and Mark Curenton were stopped, approximately one-half mile east of the intersection of Highland Avenue and Monroe Avenue, although backup was called, no backup was in place when OfficerThomas Sleep stopped the

Petitioner and Mark Curenton at gun point, and through his speaker (hailer), which speaker he claims may not have been working contrary to the testimony of Edward Murtagh Dempsey (Sleep deposition page 517) (Demspey deposition page 290) (A-290), ordered both Petitioner and Mark Curenton to crawl out of the car and lay on the grass face down. Officer Thomas Sleep acknowledges that he did not have any communications with the Petitoner or Mark Curenton, nor did he tell them of the reason for his stop. It is also undisputed that neither the Petitioner nor Mark Curenton resisted the commands of the Brighton Police Officers, and they complied promptly with every order of Officer Thomas Sleep, and thereafter the Respondents Officer Robert Hickey

and Sgt. William LaRonde arrived at the scene, and at least four to six 357 magnum guns were pointed at them while they laid on the ground in following the commands of Officer Sleep. Both Petitioner and Mark Curenton were patted down and Edward Murtagh Dempsey states that he was patted down before he was handcuffed (Dempsey deposition 302) (A-97). In the course of handcuffing Edward Murtagh Dempsey, the Respondent Officer Robert Hickey (who weighs approximately 215 lbs.) deliberately stepped on the left hand of Edward Murtagh Dempsey (Dempsey deposition 298) (A-96) and wrenched up his right arm in an unnatural way, which caused Edward Murtagh Dempsey excruitiating pain. Officer Robert Hickey claims that in a period of 30

months he had handcuffed a thousand persons (Hickey deposition 761) (A-125, A-126), and later reduced the number to five hundred, and it appears that the Brighton Police Department does not generally require the filing of "use of force reports", although the Respondents' expert Inspector Patterson states that handcuffing is a "use of force" (Patterson deposition 1130-1131) (A-140, A-141), and Chief of Police Eugene Shaw states that "use of force reports" should have been filed (Shaw deposition 207-208) (A-90).

Discovery was exceedingly arduous by reason of the Brighton Police Department's failure to keep "use of force reports", including handcuffing and requiring the Petitioner and Mark Curenton to lie on the ground, are

unquestionably examples of "use of force" and such actions should be set forth in use of force reports. This policy of the Brighton Police in its failure to keep proper records made it exceedingly difficult to fully assess the propensities of the Respondent Officer Robert Hickey. The apparent inability or reluctance of the Brighton Police Department to maintain and produce important records contributed to the difficulty of the Petitioner and Mark Curenton in securing adequate discovery to demonstrate the policies of the Brighton Police Department, particularly the policies of the Respondent Chief of Police Eugene Shaw, who has been with the Brighton Police Department continuously for approximately 37 years and has been closely

involved in training and hiring of police officers for the Brighton Police Department.

The Brighton Police Officers refused to withdraw their weapons, in spite of the requests and even begging by Edward Dempsey (Dempsey deposition 306) who was terrorized by the aiming of four to six revolvers at him, one of which was held approximately four feet from his head, notwithstanding that the Petitioner and Mark Curenton were unarmed, and Petitioner, Edward Murtagh Dempsey, was patted down before he was handcuffed (Dempsey deposition 302) (A-97). The Petitioner and his passenger Mark Curenton followed every instruction of the Respondent police officers promptly and without struggle (Hickey deposition 774, 785, 786) (A-126, A-

128), and posed no threat to the police officers since they were unarmed and in handcuffs. Admittedly Edward Murtagh Dempsey was yelling, but he denies that he was thrashing about as claimed by Sgt. William LaRonde, because he was terrorized by the excessive force used by the Brighton Police Officers who refused to withdraw their guns and neither the Petitioner nor Mark Curenton were told as to why they were stopped, and both were not free to leave as is generally admitted by the Respondent police officers . The Petitoner and Mark Curenton were clearly subject to a defacto arrest and were not released until after Mark Curenton was taken back to the bank more than a hour after the robbery for a showup, by order of the Respondent

Sgt. William LaRonde this showup of Mark Curenton was conducted more than an hour after the bank robbery, albeit a short time after the expiration of an hour, contrary to the applicable general orders with respect to "showups" after a crime has been committed (Voelkl deposition 878).

Upon motions pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Hon. David G. Larimer dismissed the action of the Petitioner Edward Murtagh Dempsey and companion action as to all respondents (A-77), (749 F. Sup. 1215). Upon appeal to the U.S. Second Court of Appeals, Judge Larimer's decision was affirmed by decision filed June 3, 1991 (90-9045). (A-1 through A-4)

ISSUE #1 -

DID THE RESPONDENT SLEEP ACT AS A REASONABLE AND PRUDENT POLICE OFFICER IN STOPPING, DETAINING AND CAUSING THE PETITIONER TO BE HANDCUFFED, INJURED, USE OF EXCESSIVE FORCE AND DEFACTO ARREST, SANS REASONABLE SUSPICION? (TERRY v. OHIO, 392 U.S. 1)

The watershed case of Terry v. Ohio, 392 U.S. 1, was a departure from the protection of the Fourth Amendment to the United States Constitution when the United States Supreme Court approved an investigative stop based on reasonable suspicion and articulable facts by a prudent police officer. It has been continually asserted by the Petitioner that he was subjected to an unlawful arrest and excessive use of force which caused resulting injuries to him in defacto arrest and conduct of the Brighton Police Officers which

clearly exceeded the permissible limits in the exception to the general rule enunciated in Terry v. Ohio that under the Fourth Amendment a seizure of a person is invalid unless justified by probable cause, Florida v. Royer, 460 U.S. 491, and a myriad number of cases that have been decided since that time. The Hon. David G. Larimer relied principally on the case of Terry v. Ohio as well as the New York State Court of Appeals case of People v. Hicks, 68 NY 2nd 241. These cases are easily distinguishable, for in the Terry v. Ohio case a seasoned detective had observed three suspicious persons for a lenghty period of time before subjecting them to an investigative stop and arrests. There appears to be no case wherein two innocent persons

were subjected to a defacto arrest without probable cause or a reasonable suspicion, which was precipitated by the unlawful actions of the Respondent Officer Thomas Sleep in initiating the arrest of Edward Murtagh Dempsey and his companion Mark Curenton because a bank robbery had occurred an hour before 4/10ths of a mile away from the intersection of Highland Avenue and Monroe Avenue in the City of Rochester and that a black man got into the car of the Petitioner Edward Murtagh Dempsey at a point where Mark Curenton had been standing for not less than 10 minutes in full view of two New York State Troopers. Mark Curenton was indeed not coming through bushes in accordance with the sworn deposition testimony of Mark Curenton, Edward

Murtagh Dempsey, Trooper Kim Smith and Sgt. Frank Murray of the New York State Police, who contrary to the speculations of Jane Conrad, counsel for all the respondents, that the New York State Troopers did not have the same description of the culprit as broadcasts over the Brighton Radio. It is admitted by Officer Thomas Sleep and his counsel, Jane Conrad, Esq., that the sole source of Officer Thomas Sleep's description information of the bank robber was from the Brighton Radio Transmissions (APPENDIX C - A-79 to A-82). The physical description of the bank robber was vastly different than the description of Mark Curenton, who had a beard and mustache, whereas the bank robber was clean shaven; Mark Curenton was medium build and the bank

robber was of thin build, and with respect to clothing, the Respondent police officers all grudingly admitted that the clothing of Mark Curenton did not match up with the clothing of the bank robber, Franklin Charles Leonard, and the Respondent Sgt. William Laronde attempted to excuse this great variance of clothing by speculating that Mark Curenton had 45 minutes to change his clothing (A-124). Judge Larimer in his decision stated in his opinion "it is undisputed, however, that as Sleep looked on with mounting interest a man stopped to pick up Curenton," (A-10) which is consistent with the testimony of Edward Murtagh Dempsey, but diametrically opposed to the deposition testimony of Officer Thomas Sleep, who consistently asserted that he only saw

Mark Curenton for a few seconds when he was looking through a lane of traffic and could not see the bottom half of Mark Curenton, and was advised upon inquiry that the bank robber was wearing sunglasses, whereas Mark Curenton was wearing plain glasses, and at no time did Officer Thomas Sleep acknowledge that he was looking for a thin face, clean shaven black man (A-105, A-113), whereas Mark Curenton had a beard and mustache. Although absolute immunity is granted to police officers who testify in court, the Hon. David G. Larimer by his suis sponte decision deprived the Petitioner of a jury trial, when in fact there were ultimate material facts to be decided by a jury as to whether Officer Thomas Sleep was testifying truthfully in view

of the more believable testimony of the two New York State Troopers, as well as the Petitioner Edward Murtagh Dempsey and Mark Curenton. The credibility of the Respondent Officer Thomas Sleep in stating that Mark Curenton was coming through the bushes is the same type of testimony which he stated when he precipitated the pick up of Greg Hammer as the first black man to be picked up within a few minutes after the crime of bank robbery was committed, who according to Lt. Thomas Voelkl acknowledged that Officer Thomas Sleep also asserted that this first black man was wearing a blue dress and combat boots was coming through the bushes in the City of Rochester (A-132). No where in the decision of the Hon. David G. Larimer did he set forth the fact that

Officer Thomas Sleep precipitated the pick up of Greg Hammer shortly after the bank robbery, or that thereafter h attempted to chase two other black men in a Crysler K-Car, one of whom was wearing a purple turtleneck sweater, and that indeed the fourth black man, namely Mark Curenton, who Officer Thomas Sleep elected to stop was based solely on the fact that Mark Curenton had some blue on and got into a car driven by the Petitioner Edward Murtag Dempsey in accordance with his daily custom, and in initiating the stop he never informed Edward Murtagh Dempsey or Mark Curenton as to why they were stopped; the respondent Officer Thomas Sleep failed to execute the stop with backup in place, which could have easily obviated the full blown defacto

arrest and vicious handcuffing by the Respondent Officer Robert Hickey, which caused excruciating pain to the petitioner, and the unholstering of not less than four 357 Magnums by Officer Thomas Sleep and other Brighton Police Officers.

Jane Conrad in oral argument before the Hon. David G. Larimer acknowledged that the fact pattern involved mixed questions of fact and law, and that she was unable to find a case where all the actions of the respondents were present which the Petitioner and Mark Curenton as plaintiff assert as violations of the civil rights of the Petitioner and Mark Curenton, and it is doubtful that there is any case wherein there was such a great departure from the limiting

factors in an investigative stop as enunciated in the Terry v. Ohio case. The credibility of the Respondents, as well as the Petitioner and Mark Curenton were proper questions for a jury, and this right has been denied to the Petitioner and Mark Curenton through the suis sponte decision of the Hon. David G. Larimer. It is reasonable to conclude that police officers such as the Respondent Officer Thomas Sleep have not complied with the spirit and intent of an investigative stop by his failure to articulate facts truthfully to support "a reasonable suspicion" or the higher standard of probable cause for a "full blown arrest."

The case of People v. Hicks (68 NY2d 234) which was heavily relied upon

by the respondents' expert Inspector James G. Patterson and the Honorable David G. Larimer, is not in point. In that case Buffalo Police Officers stopped a car at 4 a.m. coming from the direction of the robbery which occurred approximately 10 minutes before. A car was described as involved in the robbery, albeit Rogers Hicks was driving in a grey Buick instead of a green Pontiac as described; the police officers did not unholster their guns; Rogers Hicks was permitted to park his car and consented to the being taken back to the scene within minutes after being stopped, and the claimed reasonable suspicion was based on articulable facts, including the answers that were elicited from Rogers Hicks to appropriate questions of the police officers

who had explained the reason for the stop, and these black men reasonably matched the broadcast descriptions. Upon the decision of the New York State Court of Appeals, Rogers Hicks was incarcerated and commenced a federal habeas corpus proceeding pursuant to Title 28 of the U.S. Code in the U.S. District Court at Buffalo, New York which was decided by the Honorable John Curtin of the United States District Court for the Western District of New York at Buffalo on July 27, 1991 (Case 83C-341) which decision and order denied the petition of Rogers Hicks. The Order of Judge Curtin was appealed to the United States Circuit Court of Appeals for the Second Circuit which appeal was filed on August 9, 1991 (Case #91-2363.) This habeas corpus

proceeding is captioned as Rogers Hicks vs. Walter Kelley and the Attorney General of the State of New York Robert Abrams).

The Honorable David G. Larimer did not consider the opinion testimony of the Petitioner's expert Peter L. Giorgione which was filed in accordance with the Order of Magistrate Kenneth R. Fisher in behalf of the Petitioner, (APPENDIX E), nor did he consider the admissions of the Respondents expert James G. Patterson, the excerpts of which were part of the record with respect to the question of excessive force (A-137-142).

Edward Murtagh Dempsey testified that he was patted down before he was handcuffed (A-97). The usual procedure

is to handcuff and then to pat down. In the instance of patting down both Edward Murtagh Dempsey and Mark Curenton no weapons were found and it was totally unneccessary to be required to lay down with not less than four 357 Magnums pointed at them or to handcuff them which is a use of force (A-142). Clearly all of the respondent police officers could have recognized that Officer Thomas Sleep had indeed precipitated defacto arrests of two innocent persons without probable cause and that the search of Edward Murtagh Dempsey's car and Mark Curenton's gym bag without permission all in violation of the Fourth Amendment to the United States Constitution and the Article 1 Sections 11 and 12 of the New York State Constitution. The Honorable

David G. Larimer also indicates that neither Mark Curenton nor Edward Murtagh Dempsey consulted a doctor or a psychiatrist and therefore infers that no damages were caused (A-18). Indeed the record shows that Edward Murtagh Dempsey had his hand stepped on by Officer Robert Hickey deliberately (A-96), and his arm was wrenched back behind his back causing him excruciating pain, albeit the injury and pain only lasted two days, and the terrorizing experience caused to Edward Murtagh Dempsey and Mark Curenton will undoubtely have an adverse effect for the remainder of their lives. It is believed that no court has ever ruled that no injuries were incurred because a person did not go to the hospital or consult a doctor or psychiatrist

after an assault or false arrest, which Edward Murtagh Dempsey and Mark Curenton were subjected to. The decision of the Honorable David G. Larimer also indicates that all the respondents deny that Edward Murtagh Dempsy's hand was stepped on among other things, but indeed to most material questions the respondent officers instead of denying the allegations of Edward Murtagh Dempsey and Mark Curenton, continually responded to questions in their deposition with the words "I don't recall." the respondent Officer Thomas Sleep answered 14 material questions with respect to clothing of Mark Curenton; physical stature of Mark Curenton; plain glasses of Mark Curenton and the like as "I DON'T RECALL" (A-109 through

A-118). Even the respondent Robert Hickey answered material questions such as whether or not he deliberately stepped on the hand of Edward Murtagh Dempsey while handcuffing him in the same manner, "I DON'T RECALL" (A-126-127). These answers by the respondents Officer Thomas Sleep and Officer Robert Hickey are evasive and suggest that there are indeed a serious questions with respect to ultimate material facts and serious questions as to the credibility of some of the respondent police officers. The decision of the Honorable David G. Larimer is at variance with the deposition statements of the parties and non-party witnesses, for example: The facts material to this motion are not disputed, for indeed the facts are disputed (A-7);

Mark Curenton was not wearing blue clothing, but a white baseball shirt with short blue sleeves (A-10); Mark Curenton did not jump into a waiting car (A-10); "Sleep looked on with mounting interest", this is not supported by any of the testimony of Officer Thomas Sleep (A-10); description may have been different -- there is no proof of this finding, and is not consistent with the Testimony of Trooper Kim Smith (A-12); none of the respondents deny that Officer Robert Hickey, including Officer Robert Hickey, deliberately stepped on the hand of Edward Murtagh Dempsey (A-14 through A-16); Dorothy Testa did not describe a car leaving the vicinity of her home as being driven by a white man (A-134 to A-136); there are indeed

material disputed facts (A-26).

The Honorable David G. Larimer states in his decision that "Plaintiff's papers suggest some type of racial animus was present in singling out Curenton because he was black. I fail to see how race was a factor here." The Petitioner and Mark Curenton both dispute this for in essence Mark Curenton was subjected to a defacto arrest because he was a black man who did not in any way match the description of the bank robber, Franklin Charles Leonard, except that he was black, and Edward Murtagh Dempsey was a white man and was subjected to a defacto arrest because he picked up a black man, his co-worker, in spite of the fact that no auto was broadcast as being involved in

the robbery. (SEE APPENDIX C).

The testmony of the respondent Chief of Police Eugene Shaw illustrates that there are many black persons in the Town of Brighton (A -93); and the deposition testimony of Lt. Thomas Voelkl indicated that the minority population of the Town of Brighton is approximately 10% and that no black person has ever been employed as a Brighton Police Officer or support personnel, in spite of the fact that there are approximately 40 police officers and approximately an equal number of support personnel. There is at the very least an inference that the Town of Brighton is not an equal opportunity employer as alleged by Lt. Thomas Voelkl (A-130, 131).

ISSUE #2

DID THE DISTRICT JUDGE ERR IN DETERMINING ULTIMATE FACTS WITHOUT PASSING ON THE CREDIBILITY OF ANY PARTY, OR THE TESTIMONY OF PETITIONER'S AND RESPONDENTS' EXPERTS AS TO PROBABLE CAUSE, ESCESSIVE FORCE, INTER ALIA, AND DISMISSING THE PETITIONER'S COMPLAINT SUA SPONTE?

The petitioner contends that there was indeed a defacto arrest without probable cause, and that the respondent Brighton police officers, particularly Officer Thomas Sleep and Officer Robert Hickey, used excessive force, all of which conduct by respondent Brighton police officers, and this tortious conduct is chargeable to the respondent Brighton Police Force and the respondent Town of Brighton as violaltions of the pliantiffs' constitutional rights under the Fourth Amendment and Fourteenth

Amendment of the United States Constitution. Although the Federal Rule of Civil Procedure 56 frequently involves confusion and uncertainty, in this application the Honorable David G. Larimer should have granted the plaintiffs' motion for summary judgment on the questions of defacto arrest and excessive force, and permitted all other material questions of fact and damages to be passed upon by the jury.

The following quotes are derived from the written opinions of William W. Schwarzer, United States District Judge for the Northern District of California, which are set forth in the "SUMMARY JUDGMENT UNDER THE FEDERAL RULES: DEFINING GENUINE RULES OF MATERIAL FACT", 99 Federal Rules Decisions 465:

Page

466 * * * The courts have, however, been uniquely ambivalent toward Rule 56; their attitudes range from enthusiastic support for the economy and efficiency of summary judgment to hostility based on the suspicion that judges, intent on controlling their dockets, may use summary judgment as a "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial." See Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir.1940). * * *

469 II.
WHAT IS A MATERIAL FACT ISSUE
* * *

(1) is there an issue of fact appropriate for trial and
(2) is that issue material? ***

A. What is a Fact Issue in Jury Cases

Summary judgment under Rule 56 turns on the absence of an issue of material fact, but the rule does not define what is a fact. This is not surprising; judges have struggled with that question for over three hundred years without reaching a defini-

tive resolution. As the Supreme Court states in Pullman-Stand rd v. Swint. 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66(1981).

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law * * *. Nor do we yet know of any * * * rule or principle that will unerringly distinguish a factual finding from a legal conclusion. * * *

470 * * * The major source of complexity under Rule 56 is the treatment of issues of ultimate fact which may also be called mixed questions of law and fact. An ultimate fact, to be distinguished from historical or circumstantial facts, is an outcome determinative fact, derived from historical facts by a process which "implies the application of standards of law." See Baumgartner v. United States 322 U.S. 665, 64 S.Ct. 1240, 1243, 881 L.Ed. 1525 (1944); Cities Service, supra, 391 U.S. at 2891, 88 S.Ct, at 1592; Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 57 S.Ct. 569, 574, 81 L.Ed. 755 (1937). It is a mixture of fact and law; fact because it is derived by inference or reasoning from the evidence,

and law because the derivation is informed by legal principles and policies, producing a fact of independent legal significance.* * *

476 B. What is a Fact Issue in Court Cases

* * * Clearly, when a dispute over historical facts or inferences raises issues going to the weight or credibility of testimony, the party opposing the motion is entitled to confront and cross-examine witnesses at trial and the judge must consider their credibility and demeanor in finding facts. Anthony v. Petroleum Helicopter, Inc., 693 F.2d 495 (5th Cir.1982); Beckham v. Safeco Ins. Co. of America, 691 F.2d 898 (9th Cir.1982); Scharf v. United States, 587 F.2d 1240, 1243 (9th Cir.1979); National Aviation Underwriters v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir.1977). In that situation a trial is required.* * *

477 * * * While discovery is not a substitute for cross-examination where credibility or demeanor are material, it is adequate to enable an opponent to meet the merits of the motion. See Lundeen v. Cordner, 354 F.2d

401, 408 (8th Cir. 1966); subseq. opinion 356 F.2d 169, 170 (8th Cir.1966). * * *

Summary judgment should have been granted in favor of the petitioners on the questions relating to arrest and use of excessive force, and in all other respects there were indeed mixed questions of fact and law as acknowledged by the respondents' counsel, Jane Conrad, Esq., in oral argument before the Honorable David G. Larimer. The Respondent Officer Thomas Sleep responded to 14 questions relating to material facts by continually answering the questions propounded to him by saying "I DON'T RECALL" (A-104 through A-118). In like manner, the Respondent Officer Robert Hickey answered in the same way saying "I DON'T RECALL" when answering

three material questions of fact (A-126, A-127). For these reasons alone the Petitioner Edward Murtagh Dempsey was wrongfully denied of his right to a jury trial, since the credibility of the respondents, particularly Officer Thomas Sleep and Officer Robert Hickey's credibility was never tested by a judge or by a jury, and all of these questions, among others, should have led the Honorable David G. Larimer to the conclusion that indeed there were ultimate questions of fact that could not be totally resolved by him solely as a matter of law.

ISSUE #3

IS THE BRIGHTON POLICE DEPT. AND CHIEF SHAW ACCOUNTABLE AS RESPONDENT SUPERIOR DUE TO LACK OF PROPER TRAINING AS TO THE LAW OF ARREST AND FAILURE TO MAINTAIN "USE OF FORCE" RECORDS?

Historically a municipal corporation, such as the Respondent Town of Brighton and the Respondent Brighton Police Department, were generally entitled to immunity when claims were made, and there was limited immunity for police officers. This claim of immunity virtually foreclosed plaintiffs who suffered grievances from successfully bringing actions against municipal corporations such as towns and police departments on the theory of Respondeat Superior or as a result of affirmative participation in improper conduct or failures to train or to restrain police involved in improper or unlawful conduct. The Supreme Court of the United States in the case of Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d

611 (1978), indicated that the long standing rulings in the Monroe v. Pape, 365 US 167, 5 L.Ed. 2d 492, 81 S.Ct. 473 (1961) were incorrect, and the door was opened rightfully to hold municipalities such as towns and police departments civilly liable, notwithstanding the fact that the defense of immunity generally is raised in any case where a town or police department is sued as an entity. Notwithstanding the fact, as illustrated in this case, that the inadequate training of some of the Respondent Brighton Police Officers, as well as the failure to keep adequate personnel records (A-90, A-140, A-142), and the general failure to enforce the requirement of filing "use of force" reports, including but not limited to handcuffing and the like, and the erroneous

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teachings of the defendant Chief of Police Eugene Shaw who asserts that a person is not arrested unless he is advised that "you are under arrest", which teaching is improper and incorrect (A-90 through A-92, A-105, A-125). Chief Eugene Shaw has continuously been a member of the Brighton Police Department for more than 30 years and has been the Chief of Police during the majority of those years to the date hereof. The Chief of Police Eugene Shaw has been responsible for hiring and approval of general orders, as well as training, notwithstanding the fact that part of these duties are now delegated in part to Lt. Thomas Voelkl of the Brighton Police Department. It appears that Eugene Shaw had almost a controlling influence on the Brighton

Town Board in the hiring policies of the town in employing police officers and support personnel. Considering the admitted facts that the Town of Brighton has the largest number of minorities of any town in the County of Monroe (A-93), exceeded only by the City of Rochester and that the minority population including black persons is approximately 10%, and in view of the further fact that the Brighton Police Department has never hired a black person either as a police officer or as support personnel (A-130, A-131), there is an inference of bias initiated by the Town of Brighton and Eugene Shaw as Chief of Police in maintaining an employment policy of minorities as an "inexorable zero", a term which appears to have been used for the first time by the United States

Court of Appeals for the 5th Circuit in the case of United States of America v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (1975).

The testimony of one of the principal Respondent, Officer Thomas Sleep, illustrates that he also erroneously believes that a person is not under arrest unless that person subjected in a defacto arrest is so advised (A-105). One would suspect that this policy of the Brighton Police Department relating to arrest and failing to advise persons as to the fact that they are under arrest may have something to do in circumventing the clear mandate of the Supreme Court of the United States in the Miranda decision. In the case herein, it is clear that Respondent Officer Sleep did

not have bonafide articulable facts upon which he could initiate a lawful investigative stop as enunciated in the case of Terry v. Ohio, 392 US 1 (1968), and Officer Sleep appears to wrongfully assert that a suspect is "coming through the bushes" to fabricate an articulable fact as he had in the stopping of the first black man Greg Hammer (A-132), as well as the stopping one hour later of Mark Curenton (A-107), and Officer Sleep apparently does not follow the procedures for a felony stop (A-93), since he did not have backup in place when he stopped the Petitioner Edward Murtagh Dempsey or his companion Mark Curenton, and this was further illustrated by his failure to call upon the City of Rochester Police for "backup" when he was attempting to stop

two black men in a Crysler K-Car in the City of Rochester long before the time that he precipitated the stop of Edward Murtagh Dempsey and Mark Curenton. If Officer Thomas Sleep had followed proper procedures in securing "backup" in place before forcing the plaintiff Edward Murtagh Dempsey and Mark Curenton to get out of Edward Murtagh Dempsey's car and to lie on the ground at gun point, it is reasonable to conclude that such terrorizing procedures would not have been necessary, and Edward Murtagh Dempsey would not have been handcuffed after he was patted down (A-97) in violation of proper police procedures under the circumstances, and there would not have been any danger to the Respondent Brighton police officers at the scene of the stop had Officer Thomas

Sleep followed correct Police procedures, which apparently are also not enforced by the Brighton Police Department. In addition, it was clearly improper for the defendant Sgt. William LaRonde to require the plaintiff Mark Curenton to go to the Monroe Savings Bank for a showup in violation of the 45 minute rule which is a rule in the County of Monroe (A-117, A-121) and a part of the training procedure adopted by the Monroe County Police Academy. In fact, Mark Curenton was forceably taken to the Monroe Savings Bank for a "showup" more than a hour after the bank robbery occurred, albeit, a short time in excess of one hour, notwithstanding that all of the Brighton Officers at the scene of the defacto arrest transaction could have and should have seen that in

no way did Mark Curenton match the description of the bank robber Franklin Charles Leonard, including clothing description which was at great variance of the description broadcast over the Brighton Police Radio after the bank robbery, and it appears as a general policy that clothing descriptions are generally ignored by the Brighton Police Department as is illustrated by the testimony of Sgt. LaRonde that Mark Curenton "had 45 minutes to change his clothes". Notwithstanding the great variance in clothing, none of the Brighton Police Officers who participated in the transaction can ignore the fact that the bank robber was of thin build and was clean shaven, whereas Mark Curenton had a beard and mustache and was of medium build, which should have

eliminated him as a possible suspect as illustrated by the testimony of two New York State Troopers, namely Trooper Kim Smith and Sgt. Frank Murray. It appears that the only common demoninator used in stopping Mark Curenton was that he was black as was Greg Hammer the first black person who was picked up at the suggestion of Officer Thomas Sleep, and the two other black men in a Crysler K-Car, which Officer Thomas Sleep thereafter pursued were black, as was Mark Curenton.

If the decision of the Honorable David G. Larimer is allowed to stand, then this case will become a leading case utilized by all police departments to excuse actions by individual police officers which far exceed the limits of "Terry vs. Ohio" and will subsequently

create an errosion of the 4th Amendment rights to which citizens operating automobiles on the highway are entitled to expect under the Bill of Rights.

Respondent Officer Robert Hickey acknowledges that he handcuffed 500 to 1000 persons in a 30 month period, but there is a dearth of "use of force" reports filed by Officer Thomas Sleep, Officer Robert Hickey and others, which illustrates a clear policy of the Brighton Police Department not to enforce the requirement of filing use of force reports or may even be a deliberate policy not to maintain these important records as a matter of fact.

Discovery disclosed that the Petitioner Edward Murtagh Dempsey and the Plaintiff Mark Curenton, through their investigation and discovery, would

have been able to demonstrate clearly to a jury that the Town of Brighton and the Brighton Police Force should be held accountable for the following reasons:

1. Failure to maintain use of force reports and failure to require the filing of such reports.
2. Failure to instruct police officers as to the correct law pertaining to the law of arrest.
3. Failure to comply with the "45 Minute Rule" for taking a suspect back to the scene.
4. Failure to require police officers to request "back-up" where a claimed felony stops are antici-

pated.

5. A total failure to employ qualified minority persons as police officers or support personnel, in spite of the fact that the Town of Brighton has a minority population of approximately 10%.

6. Failure to censure or discipline police officers who violate the civil rights of citizens under the 4th and 14th Amendments to the United States Constitition and Article I Sections 11 and 12 of the New York State Constitution.

7. There is an inference that some of the Brighton

Police Officers fabricate alleged articulable facts to erroneously fit within the frame work of Terry v. Ohio.

Significant cases which have been decided under the claim of immunity or qualified immunity are set forth as follows: People v. Henley, 53 N.Y.2d 403, 442 N.Y.S.2d 428 (1981); City of Canton, Ohio v. Harris, --- U.S.---, 109 S.Ct. 1197, 103 L.Ed 2d 412 (1989); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978); Milligan v. City of Newport News, 743 F.2d 227, 230 (4th Cir. 1984); Pembaur v. City of Cincinnati 475 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L.Ed. 2d 452(1986); Bordanaro v. McLeod, 871 F.2d 1151 (1st

Cir. 1989); Rodriguez v. Avita, 871 F.2d 552, 555 (5th Cir. 1989), cert. denied, 110 S. Ct. 156, 107 L.Ed. 2d 114 (1989); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983).

There are a plethora of cases which have been decided since Terry v. Ohio, and there appears to be no uniformity in the decisions. Each case appears to be decided on its own factual pattern, but in this case the factual pattern far exceeds any limitating factors enunciated by Terry v. Ohio. See United States v. Jackson, 652 F.2d 244 (2d Cir. 1981), U.S. v. Glenna, 878 F.2d 967 (7th Cir. 1989) and Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

The factual pattern which is material in this case as to whether the

all the respondents should be held responsible for the tortious acts of its police officers inflicted upon the innocent petitioner, the respondents assert that this incident is a single act. The Petitioner can demonstrate otherwise, if he is accorded his right to a jury trial to determine material factual questions which are in dispute.

## CONCLUSION

For the foregoing reasons, this Petition for certiori should be granted.

Respectfully submitted,

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Dated: August 26, 1991

# APPENDICES

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed June 3, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June, one thousand nine hundred and ninety-one.

Present:

HONORABLE RICHARD J. CARDAMONE
HONORABLE LAWRENCE W. PIERCE
HONORABLE DANIEL M. FRIEDMAN*

Circuit Judges,

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MARK S. CURENTON; EDWARD MURTAGH DEMPSEY,

Plaintiffs,

EDWARD MURTAGH DEMPSEY,

Plaintiff-Appellant,

v.

TOWN OF BRIGHTON; EUGENE SHAW; CHIEF OF POLICE OF THE TOWN OF BRIGHTON; TOWN OF BRIGHTON POLICE DEPARTMENT; Officers THOMAS SLEEP; ROBERT E. HICKEY; FRED J. MELLINI; Sergeant WILLIAM LARONDE; DOES 1 THROUGH 6,

Defendants-Appellees.

O R D E R
Docket No. 90-9045

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Plaintiff Edward Murtagh Dempsey appeals from a judgment of the United States District Court for the Western District of New York (Larimer, J.), entered October 29, 1990, granting summary judgment sua sponte in favor of defendants Thomas Sleep, Robert E. Hickey, Fred J. Mellini, William LaRonde, and Does 1 through 6, granting the summary judgment motion of the above-named defendants and defendants the Town of Brighton; Eugene Shaw, Chief of Police of the Town of Brighton; and the Town of Brighton Police Department, and dismissing appellant's 42 U.S.C. Section 1983 claim.

We affirm the judgment of the

district court substantially for the reasons stated in Judge Larimer's thorough opinion dated October 29, 1990, noting only that whether the detention of appellant was an investigative stop or arrest, the district court correctly concluded that the individual defendants -- Thomas Sleep, Robert E. Hickey, Fred J. Mellini, William LaRonde, and Does 1 through 6, were entitled to qualified immunity, see Warren v. Dwyer, 906 F.2d 70, 74 (2d Cir. 1990); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987). Thus plaintiff's false arrest claim was correctly dismissed as to him. We have considered plaintiff's other arguments and conclude they are without merit.

The judgment of the district court is accordingly affirmed.

s/Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/Lawrence W. Pierce
Lawrence W. Pierce, U.S.C.J.

s/Daniel M. Friedman
Daniel M. Friedman, U.S.C.J.

* Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

EDWARD MURTAGH DEMPSEY,

Plaintiff,

v.

TOWN OF BRIGHTON, EUGENE SHAW, Chief of Police of the Town of Brighton, Officers THOMAS SLEEP, ROBERT E. HICKEY and FRED J. MELLINI, Sergeant WILLIAM LA RONDE, and JOHN DOES 1 tnrough 6,

Defendants.

---

MARK S. CURENTON,

Plaintiff,

v.

TOWN OF BRIGHTON, EUGENE SHAW, Chief of Police of the Town of Brighton, Officers THOMAS SLEEP, ROBERT E. HICKEY and FRED J. MELLINI, Sergeant WILLIAM LA RONDE, and JOHN DOES 1 through 6,

Defendants.

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DECISION AND ORDER

Civ. 88-726L - Civ. 88-930L

Plaintiffs Edward Murtagh Dempsey and Mark S. Curenton brought these two actions pursuant to 42 U.S.C. Sections 1981, 1983, 1985 and 1988 to recover damages allegedly suffered when defendant officers of the Brighton, New York, Police Department mistakenly detained them upon suspicion of bank robbery.

Plaintiffs move for partial summary judgment on their claims of false arrest and excessive force. Defendants cross-move for partial summary judgment on the issues of negligent training and supervision. For the reasons that follow, I find that this incident was an investigatory stop made upon appropriate reasonable suspicion, and consequently grant summary judgment in favor of the defendants and

dismiss the complaint.

## I. BACKGROUND

The facts material to this motion are not disputed. This is a case of mistaken identity. It arises out of the June 12, 1987 detention of plaintiffs by members of the Brighton, New York, Police Department on suspicion of bank robbery.

### A. The Facts

On June 12, 1987, at approximately 1:30 in the afternoon, a man entered the Monroe Savings Bank on Monroe Avenue in Brighton and handed the teller a note. The note, written on a brown paper bag, directed the teller to hand over all of her one, five and ten dollar bills. Although the bank robber made referenced to a gun during the course of the hold-up, no weapon was actually seen.

Eyewitnesses agreed that the robber placed the cash in a paper bag and fled the bank of foot heading toward the City of Rochester.

Immediately after the robbery, the branch manager of the bank notified the Brighton Police Department of the incident and gave the police dispatcher a description of the robber. The initial information broadcast to the Brighton police units on patrol described the robber as "a young black male wearing a blue jacket, unknown is a weapon was shown. Last seen heading towards the city on foot on Monroe Avenue." Radio Transmission Tape for June 12, 1987, Tape 2, at 2.

Several minutes later, the police dispatcher broadcast the following description of the robber:

> You are looking for a male black, 6 foot, slim built, wearing a long-sleeved purple shirt, blue jeans, tan hat with a chin strap, sunglasses. Do not have a description on any vehicle. Last seen on foot towards the city on Monroe Avenue. A gun was threatened but none displayed.

Radio Transmission Tape, Side A, Tape 2, at 11.

Brighton Police Officer Thomas Sleep, a seventeen year veteran with the force, was assigned to patrol the area near the bank. About an hour after the robbery, as police combed the area for a suspect, Officer Sleep spotted plaintiff Mark S. Curenton ("Curenton"), a black man, at the corner of Highland and Monroe Avenues. This location is about four-tenths of a mile "towards the city" of Rochester from the bank. According to Officer Sleep, Curenton--who stands

about six feet tall and was wearing blue clothing and sunglasses--emerged from some shrubbery near the street corner carrying a bag and jumped into a waiting car. Deposition of Thomas Sleep, November 27, 1989, at 438-40, 460-63; Radio Transmission Tape, Side A, Tape 2, at 17-18. Curenton strongly denies that he came out from behind bushes. Rather, Curenton claims that he was standing on the curb or sidewalk when Officer Sleep first saw him. Deposition of Mark S. Curenton, February 17, 1988, at 13-14; deposition of Edward M. Dempsey, November 22, 1989, at 283-84.

It is undisputed, however, that as Sleep looked on with mounting interest a compact blue Toyota driven by a white man stopped to pick up Curenton. The driver and owner of the car was

plaintiff Edward Murtagh Dempsey ("Dempsey"), a friend and college classmate of Curenton's. It was apparently the two men's custom to meet each day at an appointed time near the Monroe-Highland intersection in question. Dempsey would then pick up Curenton and the two would drive together to the local lumberyard where they both worked. Officer Sleep, mistakenly suspecting that he had picked up the trail of robbery suspects, followed Dempsey and Curenton for a short distance in his police cruiser. Before long, Sleep determined to stop the two.

Defendants acknowledge that two New York State Police troopers in separate cruisers were also patrolling the vicinity of Monroe and Highland at this time. The troopers apparently

spotted Curenton, but concluded that he did not fit their description of the bank robber. However, it appears that their description of the robber may have been different then the one Sleep had because the state troopers did not receive the Brighton police radio frequency.

After a call to Brighton Police headquarters confirming the bank robber's description and requesting help, Sleep turned on his flashers and pulled over Dempsey's Toyota.

Sleep acted under so-called "felony-stop" procedures, which the Brighton police are trained to employ in potentially violent encounters. Under these procedures Sleep, without leaving his cruiser's side, unholstered his gun and over the cruiser's public address

system ordered Dempsey to throw his keys out of the driver's window. Dempsey did so. Sleep then ordered both Dempsey and Curenton to put their hands on the car's windshield where he could see them. they did so. Lastly, the policeman ordered Curenton, and then Dempsey, to crawl out of the passenger's side of the Toyota and lay face down on the grass. Still at gunpoint, plaintiffs complied.

While all this was occurring, backup arrived in the form of defendant Officers Robert E. Hickey and Frederick J. Mellini. More officers may have come onto the scene shortly thereafter. These officers approached plaintiffs with weapons drawn, in order to search them. During this time the police maintained that they kept their guns trained on plaintiffs for no more than a

couple of minutes, until plaintiffs were handcuffed and searched. Plaintiffs say it was longer.

Though the plaintiffs apparently put up no resistance, it is undisputed that Dempsey was yelling and thrashing about. Dempsey Deposition at 307; Deposition of Frederick Mellini, November 27, 1989, at 584; Deposition of Robert Hickey, November 27, 1989, at 796. Dempsey also demanded that the Brighton Town Supervisor, a friend of Dempsey's, be contacted. Dempsey Deposition at 307.

Dempsey claims that one of the officers deliberately stepped on his hand while he was on the ground; for their part, each officer involved in this incident denies the charge. It is also a fact, however, that plaintiff did

not seek, or require, medical treatment after this incident.

The officers then handcuffed the plaintiffs' wrists behind their backs while they conducted a pat-down search of plaintiffs. The officers claim that plaintiffs were handcuffed only a minute or two, until it was determined that plaintiffs were unarmed. The plaintiffs allege that they were handcuffed for approximately ten minutes. In any event, it seems clear that the officers uncuffed the two men upon finding no weapons on them.

Sergeant William LaRonde, another member of the Brighton police force, arrived as the plaintiffs were being handcuffed. Sergeant LaRonde ordered Officer Mellini to take Curenton to the Monroe Savings Bank for a show-up

identification. LaRonde gave this order based on information he received from a police investigator at the bank that a blue compact car, driven by a white man, may have been involved and based on his belief that Curenton matched the general description of the bank robber. Deposition of William LaRonde, November 27, 1989, at 645. A witness told the investigator that she saw a blue compact car, driven by a white man, speed away from the bank's vicinity immediately after the robbery.(1)

At Sergeant LaRonde's direction, Officer Mellini placed Curenton in a police cruiser and took him to the bank

(1) However, Officer Sleep did not know about the blue "get-away" car when he stopped plaintiffs. This information had not yet been broadcast over the police radio.

for a show-up identification. It is unclear whether the officers told Dempsey that he was free to leave at this time. In any event, Dempsey remained at the stop site to wait for his friend. Curenton was not taken to the bank in handcuffs. Curenton Deposition at 30; Hickey Deposition at 792. In fact, he was completely cooperative with the police. At the bank, eyewitnesses advised Mellini that Curenton was not the robber.

Mellini then returned to the point where the stop occurred. Dempsey was waiting with several officers. The officers claim that they apologized, and that Dempsey shrugged the whole thing off, joking that he had received harsher treatment from his mother. Mellini Deposition at 582, 587-88. Plaintiffs

now deny this. Dempsey Deposition at 308, 316-18. In the end, plaintiffs drove off to work.

It is undisputed that the entire incident lasted approximately twenty minutes. It is similarly undisputed that at no time did the officers tell plaintiffs that they were under arrest or give any Miranda warnings. It also appears undisputed that plaintiffs were not physically injured in any way. No medical treatment was requested or sought by plaintiffs. Finally, though a television news crew with a camera appeared briefly on the scene, it is uncertain whether it shot any footage. If it did, any resulting film was apparently never aired. It is undisputed that no one who personally know either of the pliantiffs witnessed this

incident.

About two months later, Franklin Charles Leonard confessed to the Monroe Savings Bank robbery. He is now in jail.

B. The Lawsuit

Plaintiff Dempsey initiated this action on July 7, 1988, claiming violations of his Constitutional rights by the defendants, the Town of Brighton, its chief of police and certain of the Town's police officers. Plaintiff Curenton commenced a parallel action on August 31, 1988. By order dated January 11, 1989, this court consolidated these actions.

Plaintiffs claim that the individual police defendants violated their civil rights by mistakenly

subjecting them to a full arrest without underlying probable cause and by employing excessive force. Plaintiffs also claim that their civil rights were violated by the town, its police department and its police chief, in that these parties engaged in a policy of failing to train or supervise the Brighton police officers involved in the incident, which failure resulted in discrimination against plaintiffs on the basis of race. Defendants deny all this, and claim that the incident was merely an investigative detention made upon the appropriate level of reasonable suspicion.

Plaintiffs move for partial summary judgment, praying in essence that I find that this incident was an arrest, and that the police must

consequently demonstrate the higher standard of probable cause to justify the seizure. Defendants cross-move for partial summary judgment on the issues of negligent training and supervision.

## II. DISCUSSION

### A. Summary Judgment: The Legal Standard

The purpose of a summary judgment motion "is to isolate and dispose of factually unsupportable claims...." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Federal Rule of Civil Procedure 56(c) requires the court to grant summary judgment if the evidence offered demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The

burden of demonstrating the lack of any genuine issue of material fact rests on the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Ambiguities or inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the summary judgment motion. Id. However, a non-moving party may not rely on mere conclusory allegations but must set forth "concrete particulars" to defeat summary judgment. Project Release v. Prevost, 722 F.2d 960, 969 (2d Cir. 1983).

It is well settled that "summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Section

2720, pp. 29-30 (2d ed.1983). See also Lowenschuss v. Kane, 520 F.2d 255, 261 (2d Cir. 1975) (sua sponte award of summary judgment in favor of non-moving party appropriate); Local 33, Intl. Hod Carriers Bldg. & Common Laborers' Union of America v. Mason Tenders Dist. Council of Greater New York, 291 F.2d 496, 505 (2d Cir. 1961)("(I)t is most desirable that the court cut through mere outworn procedural niceties and made the same decision as would have been made had defendant made a cross-motion for summary judgment.")

A motion for summary judgment searches the record. American Camping Ass'n, Inc. v. Whalen, 554 F. Supp. 396, 399 (S.D.N.Y. 1983); McGovern v. Blaha, 496 F.Supp. 964, 965 (W.D.N.Y. 1980); In re AP Industries, Inc., 117 B.R. 789,

796 (Bankr. S.D.N.Y. 1990). If undisputed facts are found which, when applied to the law, indicate that judgment against the moving party is appropriate, Rule 56(c) will operate to grant summary judgment in favor of the non-moving party. See Project Release v. Prevost, 722 F.2d 960, 969 (2d Cir. 1983)(a district judge may grant summary judgment to a nonmoving party, if no genuine issues of material fact have been shown.) "The making of a motion for summary judgment exposes the moving party to the risk that summary judgment will be granted against him, if the submissions make clear that there is 'no genuine issue as to any material fact....'" Siderius, Inc. v. M.V. "Ida Prima", 613 F. Supp. 916, 923 (S.D.N.Y. 1985).

The practice of allowing summary jugment to be entered for the non-moving party in the absence of a formal cross-motion is in keeping with the objective of Rule 56 to expedite the disposition of cases. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Section 2720, p.33 (2d ed. 1983). It is also in keeping with the mandate of Rule 54(c) requiring the court to grant the relief to which a party is entitled "even if the party has not demanded such relief in his pleadings." Id.

A district court also possesses the power to grant summary judgment sua sponte when neither party has moved for such relief. Celotex Corp. v. Catrett, 477 U.S. at 326; 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, at 27-29. In Celotex, 477

U.S. at 3261, Chief Justice Rehnquist stated that "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." The Second Circuit has said that "(a) court may grant summary judgment sua sponte when it is clear that a case does not present an issue of material fact." Project Release v. Prevost, 722 F.2d 960, 969 (2d Cir. 1983).

Applying these principles in the instant case, I conclude that the undisputed material facts mandate the entry of summary judgment for defendants on plaintiffs' federal civil rights clais. The parties have been given ample opportunity to discover and

present evidence designed either to support or refute the respective requests for summary judgment.(2) Despite extensive discovery and nearly one thousand pages of deposition testimony, memoranda and pleadings submitted by plaintiffs' counsel, plaintiffs have failed to raise a

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(2) In fact, discovery in this matter has been exhaustive. Plaintiff Dempsey submitted five sets of interrogatories, three notices to admit, and has deposed fourteen individuals. Additionally, over the course of this litigation, plaintiffs' counsel has submitted numerous repetitive and conclusory affidavits concerning his legal and factual contentions. In particular, plaintiffs' counsel filed three supplemental affidavits in support of plaintiffs' motion for partial summary judgment and in opposition to defendants' cross-motion.

genuine issue as to any material fact.(3)

Moreover, plaintiffs were certainly on notice that they had to come forward with all of their evidence as to the issues concerning false arrest and excessive force. Plaintiffs were the ones moving for summary judgment on these issues. In their view, the undisputed facts were such that the Court should rule as a matter of law that the confrontation between plaintiffs and the police was tantamount to an arrest and therefore it could only be justified if there was probable

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(3) In fact, plaintiff Curenton's counsel acknowledges that there is no genuine issue of fact concerning the events of June 12, 1987. Affidavit in Response to Defendants' Motion for Summary Judgment, p. 2, paragraph 5.

cause. Because of plaintiffs' motions, I have searched the record and, based on the undisputed material facts, I conclude that the seizure was reasonable under the Fourth Amendment as an investigatory stop. Just because I disagree with plaintiffs' legal conclusion from the undisputed facts does not mean that I am precluded from granting summary judgment against the moving party on this issue. The record indicates that all the facts necessary for the disposition of this case are beyond dispute. No further refinement of the factual record or legal argument could serve to alter the Court's conclusion that plaintiffs are not entitled to prevail on this complaint.

B. The Police Acted Reasonably In Stopping Plaintiffs Dempsey and Curenton

The principal issues framed by the parties is whether the stopping of Dempsey and Curenton was an investigatory stop or an arrest. Plaintiffs claim that as a matter of law the stopping and detention was tantamount to an arrest. In plaintiffs' view, because there was an absence of probable cause to support the arrest, they are entitled to a finding in their favor as to liability. Defendants contend that the contact between plaintiffs and the police was not an arrest but merely an investigatory stop justified by the peculiar circumstances of the case.

Because this dispute arises by means of cross-motions for partial summary judgment, the court must also

consider carefully whether these issues can be resolved by the court as a matter of law or whether they should be left for the jury. Plaintiffs claim that their view of the case warrants a finding as a matter of law that the confrontation was an arrest requiring probable cause. The undisputed material facts, however, lead to a different conclusion.

An unfortunate as the events of June 12, 1987 may have been to plaintiffs, nevertheless, I believe that as a matter of law the police conduct here was reasonable and proper. In my view, the detention of plaintiffs was an investigatory stop based on articulable facts and, as a matter of law, was reasonable under Fourth Amendment standards.

The Fourth Amendment guarantees citizens the right to be free from "unreasonable" searches and seizures. This case must, of course, be viewed in the context of the Fourth Amendment. Accordingly, the Court must determine whether the stopping of Dempsey's vehicle by the police, the detention of the two men for approximately twenty minutes and the transportation of Curenton to the bank constituted an unreasonable seizure.

It is clear that Curenton and Dempsey were not in fact formally arrested. They were not taken to the station house, booked and charged with a crime. Plaintiffs were free to go after the questioning and show-up had achieved their purpose. It is also clear, however, that the police "seized" them

as that term is understood under the Fourth Amendment. "'(W)henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.'" Michigan v. Summers, 452 U.S. 692, 696, n.5 (1981)(citing Terry v. Ohio, 392 U.S. 1, 16 (1968)). But this does not end the inquiry, rather it is the place to begin.

The question, therefore, is actually not whether Dempey and Curenton were under arrest, it is whether their admitted seizure by the police was reasonable under the circumstances.

Analysis of this issue must begin with Terry v. Ohio, 392 U.S. 1 (1968). The Supreme Court's landmark decision in Terry recognized that a police officer has the right to stop and detain

citizens if the officer's action was reasonable. The police must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. This is not a subjective standard but an objective one.

In evaluating whether the seizure was reasonable under the Fourth Amendment, there is a two-part inquiry. First, the court must determine whether the officer's action was justified at its inception and, second, whether the action was reasonably related "in scope" to the circumstances which justified the interference in the first place. Id. at 20; United States v. Alexander, 907 F.2d 269, 272 (2d Cir. 1990).

Terry created an exception to the

general rule that under the Fourth Amendment a seizure of a person is invalid unless justified by probable cause. As the Supreme Court noted in Florida v. Royer, 460 U.S. 491, 498 (1983), under Terry, "certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime."

Terry involved a brief encounter on the street between a police officer and a suspect. It is clear, however, that investigatory stops need not be so fleeting. See United States v. Sharpe, 470 U.S. 675, 682-86 (1985) (twenty minute investigative detention without interrogation was reasonable). Moreover, the "scope" of the intrusion that is permitted "will vary to some extent

with the particular facts and circumstances of each case." Royer, 460 U.S. at 500. In Royer, the Supreme Court summarized the rule concerning the length of the detention.

> (A)n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

460 U.S. at 500.

Two recent Supreme Court cases, United States v. Sharpe, supra, and Graham v. Connor, 109 S.Ct. 1865 (1989), have further clarified what is permitted during an investigatory stop.

In Sharpe, the Court made it clear that the length of the detention alone does not transform an investigatory stop

into an arrest. 470 U.S. at 685-86; see United States v. Place, 462 U.S. 696, 709, n.10 (1983). The Supreme Court stated:

> If the purpose underlying a Terry stop -- investigating possible criminal activity -- is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief period involved in Terry . . .

Sharpe, 470 U.S. at 685-86 (quoting Michigan v. Summers, 452 U.S. 692, 700, n.12 (1981)).

In Graham v. Connor, 109 S.Ct. 1865 (1989), the Supreme Court established the parameters by which all Section 1983 claims involving excessive force during the course of an arrest or an investigatory stop are to be measured. The Court rejected the "substantive due process" analysis of

Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). Instead, the Court held in Graham that any analysis concerning whether the force used was excessive must begin with traditional Fourth Amendment principles. 109 S.Ct at 1870. The Supreme Court concluded that "all (Section 1983) claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Id. at 1871 (emphasis in original).

Accordingly, the reasonableness of the force used must be balanced against

the circumstances of the case. Whether the force used to effect a particular seizure is "reasonable" "requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing government interest at stake." Graham, 109 S.Ct. at 1871 (quoting Tennessee v. Garner, 471 U.S.1, 8 (1985)).

The reasonableness standard employed in such cases is an objective one and is made without reference to the officer's underlying intent or motivation. In other words, this standard must be judged from the perspective of a reasonable officer on the scene, "rather than with a 20/20 vision of hindsight." Graham, 109 S.Ct. at 1872. The Supreme Court also noted that '(t)he calculus of

reasonableness must embody an allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain and rapidly evolving--about the amount of force that is necessary in a particular situation." Id.

Displaying a weapon relates to the amount of force that may be reasonably used to effect the stop. The fact that officers unholstered their weapons in effecting a Terry stop does not automatically elevate the stop to an arrest. United States v. Harley, 682 F.2d 398, 401 (2d Cir. 1982); United States v. Buffington, 815 F.2d 1292, 1300 (9th Cir. 1987) (no arrest when defendants "forced from their car and made to lie on wet pavement at

gunpoint"); United States v. Jacobs, 715 F.2d 1343, 1345-46 (9th Cir. 1983) (no arrest when suspect removed from car at gunpoint and ordered to "prone out" on ground).

Whether it is reasonable to display a weapon depends on the crime being investigated, the place and time of the stop as well as the reaction of the suspect. Id. at 402. As the Second Circuit noted in Harley, "(w)hat might be unreasonable when an officer merely suspects that a minor offense has been committed is not unreasonable when, as here, officers have reason to fear that a suspected criminal is armed." Id. If there is sufficient reasonable suspicion to justify an investigatory stop, reasonable force may be used to effect that stop. Id. at 402.

Likewise, the handcuffing of a suspect does not convert a stop into a arrest. See, e.g., United States v. Glenna, 878 F.2d 967, 972 (7th Cir. 1989); United States v. Bautista, 684 F.2d 1286, 1289-90 (9th Cir. 1982), cert. denied, 459 U.S. 1211 (1983). In addition, a person is not under arrest simply because he is placed in a police patrol car. See, e.g., United States v. Parr, 843 F.2d 1228, 1231 (9th Cir. 1988).

Applying the principles established in the cases cited above, it is my view that under Fourth Amendment standards, the stopping and seizure of Dempsey and Curenton for a period of about twenty minutes while Curenton was taken to the bank for viewing was reasonable.

1. The Stop

Under the first part of the analysis, I must determine if the initial stop was reasonable and justified. On the facts presented here, I find as a matter of law that the stop was reasonable. The officers were investigating a serious crime -- armed bank robbery -- that had occurred less than an hour earlier, about four blocks from where the plaintiffs were initially spotted. The fact that a known crime had occurred is very important and distinguishes this case from others where the police had no independent evidence that a crime had occurred before they confronted a suspect.

The contact took place just a few blocks from the crime scene in the direction that the robber reportedly had

fled. The undisputed evidence is that a black man robbed the bank. Plaintiffs' papers suggest some type of racial animus was present in singling out Curenton because he was black? I fail to see how race was a factor here. The police knew that the perpetrator was black. It would have been folly for them to look for anyone other than a person fitting the general description of the robber. If there had been no description of the robber as black, it might well have been impermissible to single out black men but that is certainly not what occurred in this case.

Based on the descriptions of the robbery suspect given over the police radio, it was reasonable for Officer Sleep to believe that he had a basis to

stop and investigate Curenton. Radio broadcasts after a robbery are not always models of precision and clarity. In the often frenzied and fast developing circumstances immediately following a robbery, police officers often must rely upon sketchy information in an attempt to apprehend the perpetrators.

The description broadcast over the police radio described the robber as a young black male, about six feet tall with a slim build wearing a long-sleeved purple shirt, or possible a blue jacket, a hat and sunglasses. The suspect was also described as having threatened a gun, although one was not displayed. Officer Sleep saw Curenton and believed he matched the general description of the robber. He described Curenton as a

black male, about six feet tall, wearing blue clothing and sunglasses. He also saw that Curenton was carrying a bag. Sleep's interest was further aroused when he saw Curenton jump into a waiting car. It is also important to keep in mind that all of this transpired within four tenths of a mile from the bank.

Sleep made a decision to stop Curenton and investigate further, but only after first confirming the suspect's description with the dispatcher. Considering all the information available to Sleep, his decision to stop the plaintiffs and investigate was justified. The only other choice that Sleep had at the moment was simply to let the car drive away and perhaps be lost forever.

Having made the decision to stop

Dempsey's vehicle, Sleep then had two choices: He could saunter up to the car window and confront the two unknown men or he could take reasonable precautions for his safety and the safety of bystanders before he investigated further. I cannot fault Sleep under the facts here for choosing the latter course. Sleep had articulable facts amounting to a suspicion that one of these men had just committed armed robbery. Based on these facts, it was not unreasonable for Sleep to suspect that the other man was a cohort, driving the get away vehicle. In my view, it would have been unreasonable for Sleep not to take precautions to protect himself and bystanders. See Harley, 682 F.2d at 402 ("In weighing the conduct of the officers involved, we must give due

consideration to their experienced judgment.")

Further, the Brighton Police Department's felony-stop procedures are designed to guard against the special dangers faced by police when attempting to approach suspects in automobiles. Terry recognized that it is unreasonable for courts to require police officers to take "unneccesary risks in the performance of their duties." Id. at 23. Cases are legion that support that principle. See Harley, 682 F.2d at 402 ("We would be heartless if we did not share the officers' concern for their own safety.... (W)e cannot impose on law enforcement personnel the hobson's choice of keeping their guns holstered when to do so 'increases the risk that they will be shot.'")

The Second Circuit recently noted in Alexander that it was not unreasonable for investigating officers to protect themselves by unholstering their guns especially in a car-stop situation which is "especially hazardous and supports the need for added safeguards." Alexander, 907 F.2d at 273. In Alexander, the officers stopped the suspect's car, approached him with guns drawn, removed him from the car and frisked him. The Court of Appeals stated:

> There are no hard and fast rules for evaluating the conduct of law enforcement officers conducting investigative stops. (Citations omitted.) A law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself and an obligation to ensure the safety of innocent bystanders, regardless of whether probable cause

> to arrest exists. (Citations omitted.) The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. (Citation omitted.)

Alexander, 907 F.2d at 272.

In the case before me, I do not find that the amount of force used by these officers to freeze the situation upon their first contact with plaintiffs was excessive as a matter of law.(4).

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(4) Plaintiff Dempsey also claims that the police used excessive force when one of the officers allegedly stepped on his hand as the police were attempting to handcuff him. The officers deny intentionallyi stepping on Dempsey's hand. At best it was inadvertent.

Accepting plaintiff's facts are true, this can hardly be called excessive force. "'Not every push or shove, even if it may later seem

(continued...)

2. The Show-up

The next issue is whether the police were reasonable in transporting Curenton to the bank and in detaining Dempsey during that process. The parties agree that the entire stop, detention and show-up took no more than 20 minutes.

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(4)(...continued)
unnecessary, in the peace of a judge's chambers,' violates the Fourth Amendment." Graham v. Connor, 109 S.Ct. 1854, 1872 (1989) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

This alleged use of excessive force took place while officers were attempting to handcuff Dempsey, who at that point was yelling and may have been thrashing about. The police also suspected that he might be armed. Since the officers reasonably suspected that a gun was involved in the crime, they were entitled to use reasonable force to carry out their lawful duties to prevent a dangerous confrontation and to investigate possible criminality.

Based on the circumstances facing the officers at the time and based on 20/20 hindsight, the officers' transportation of Curenton to the scene is precisely what should have been done under the circumstances. The quickest, least intrusive way of determining if Curenton was in fact the robber was to take him to the bank for a viewing by the tellers who witnessed the robbery. Courts have time and again approved on-the-scene showups, occurring reasonably soon after the crime, as one of the best ways not only to catch the criminal but also to exonerate the innocent. People v. Hicks, 68 N.Y.2d 241, 242-43 (1986); United States v. Bennefield, 741 F. Supp. 1002, 1006 (D. Mass. 1990) ("(W)here the innocent may have been mistakenly apprehended, prompt

identification allows the police to realize their error and to continue their search while the criminal is still within easy reach.").

Within a matter of minutes, Curenton was taken a few blocks back to the bank, viewed by the victim teller and exonerated. The justification for taking Curenton back to the bank is strengthened by the fact that Sergeant LaRonde, who ordered that Curenton be transported to the bank for the show-up, was aware that a blue "get-away" car may have been involved. LaRonde Deposition at 645. Sergeant LaRonde ordered the show-up based on his belief that Curenton matched the general description of the bank robber and his knowledge that a blue compact car, driven by a white man, may have been involved in the

robbery. LaRonde Deposition at 645.

Curenton was not taken to the bank in handcuffs and, in fact, accompanied the officer without objection. He was completely cooperative with the police. Immediately after the show-up exonerated Curenton, the police returned him to Dempsey's vehicle and both men departed for work.

The police acted reasonably here. The scope of the detention was limited. Curenton was not interrogated for long periods of time; he was given a prompt explanation as to why he was taken to the bank and he was never taken to a police station or other location for questioning.

People v. Hicks, supra, decided by New York's highest court about a year before the stop of Dempsey and Curenton,

is squarely on point. In that case, the New York Court of Appeals conceded that probable cause was lacking to arrest Hicks. But, based on the description of the robber, the court held then it was reasonable to stop the defendant and return him to the scene for viewing by the robbery victims. Hicks discussed the same issue presented here, that it, what are the bounds of a "prolonged" Terry stop. Hicks, 68 N.Y.2d at 241. The Court of Appeals upheld the show-up procedure not only because its purpose was to confirm or dispel reasonable suspicion quickly, but also because the authorities knew that a crime had actually been committed, the period of detention was brief, the crime scene to which defendant was taken was very close, and eye witnesses were there.

Hicks, 68 N.Y.2d at 243.

> Nor does the fact that the detention included transporting defendant to the crime scene render the seizure unreasonable. There were witnesses within a quarter mile of the place of inquiry -- approximately one minute away by car -- who had just seen the perpetrators and would either identify defendant (in which event he would be arrested) or not identify him (in which event he would be released). A speedy on-the-scene viewing thus was a valuable to law enforcement authorities and to defendant and was appropriate here.

The factors in Hicks that made the show-up reasonable in that case are also present here. The police action was aimed at confirming or dispelling reasonable suspicion quickly. The Brighton Police officers knew that the crime of armed robbery had actually been committed; the total period of detention

was about 20 minutes, the crime scene to which Curenton was taken was very close, and eyewitneses were there; and finally there is no proof of significantly less intrusive means available to accomplish the same purpose.

Finally, I note that neither plaintiff appears to have alleged any damage--aside from the loss of a few minutes--other than the injury to his dignity. Under the circumstances, it appears then that the actions taken by the officers were successful both in minimizing danger to themselves and harm to plaintiffs. Their conduct also resulted in the prompt release and exoneration of Curenton.

## C. Qualified Immunity

I believe that under applicable precedent, the Brighton Police were reasonable in stopping pliantiff's vehicle and in transporting Curenton a few blocks to the bank for viewing by bank employees. In addition, I believe that summary judgment for the individual officers is also appropriate because on these undisputed facts the officers had qualified immunity from any civil actions relating to their conduct.

Questions of immunity should be resolved at the earliest possible stage of the litigation so that an officer who is immune from suit will not have to proceed through a lengthy trial to establish that fact. Qualified immunity is not really an affirmative defense but

is more in the nature of a bar to suit. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). "(T)he defense has been construed as an immunity from suit not a mere defense to liability." Warren v. Dwyer, 906 F.2d 70, 74 (2d Cir. 1990).

If there are no material disputed facts to be resolved, then the decision concerning qualified immunity is a question of law for the court to decide. Finnegan v. Fountain, No. 89-7832, slip op. at 6676 (2d Cir. October 1, 1990).

The standard for determining qualified immunity in federal court, "was designed to facilitate resolution of the defense on a motion for summary judgment." Warren, 906 F.2d at 74. In Warren, the Second Circuit stated that the "better rule" is for the Court to decide the issue of qualified immunity

as a matter of law, "preferably on a pretrial motion for summary judgment." 906 F.2d at 76. See also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (the qualified immunity test "permits the resolution of many insubstantial claims on summary judgment").

The standard for determining whether qualifed immunity applies is now well established. In Warren, a recent case concerning a Section 1983 suit for false arrest, the Second Circuit summarized the applicable principles:

> Government officials performing discretionary functions are shielded from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 567 U.S. 800, 818 (1982). Even where the law is "clearly established" and the scope of an official's

> permissible conduct is "clearly defined," the qualified immunity defense also protects an official if it was "objectively reasonable" for him at the time of the challenged action to believe his acts were lawful. Anderson v. Creighton, 483 U.S. 635, 641 (1987) (explaining Harlow v. Fitzgerald, 457 U.S. at 800); Robison v. Via, 821 F.2d 913, 920-21 (2d Cir. 1987) (acknowledging three avenues of relief).

906 F.2d at 74.

A grant of summary judgment is appropriate if the defendant official "adduce(s) sufficient facts (such) that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant to believe that he was acting in a fashion that did not clearly violate an established federally

protected right." Robison, 821 F.2d 921. It is also well established that an officer is entitled to qualified immunity as a matter of law if the undisputed facts and all permissible inferences show either (a) that it was objectively reasonable for the officer to believe that probable cause existed, or (b) that officers of reasonable competence could disagree on whether there was probable cause or, in this case, whether there was a reasonable suspicion under Terry v. Ohio standards. Robison, 821 F.2d at 921.

In the case, I believe that the officers acted "reasonably" under the Fourth Amendment standards in stopping the plaintiffs to investigate the robbery. But, even if I had determined that there was not a sufficient basis

for the stop or that the stop was too long, I still believe that the officers have qualified immunity because it was objectively reasonable for Officer Sleep to believe that his actions were lawful. Robison made it clear that if officers of reasonable competence disagree as to the propriety of the stop, then an officer who made the decision to stop would be protected. 821 F.2d at 921.

It is, of course, a well established right that a citizen cannot be arbitrarily stopped by the police without some legitimate basis. But it has been recognized, at least since the Supreme Court's decision in Terry v. Ohio, that the police may detain suspects, even though there is no probable cause for arrest, as long as the officer has a reasonable suspicion

based on articulable facts that criminal activity is involved.

In my view, it was objectively reasonable for Officer Sleep to believe that under established legal principles he could stop the plaintiffs to investigate the bank robbery. As discussed above, the description of the robber and the description of Curenton were similar enough to justify a reasonable officer in stopping and detaining the plaintiffs. Frankly, based on what has occurred and based on the information that Sleep had, it may well have been a dereliction of duty for him to have simply let Curenton drive away.

It was objectively reasonable for the police to believe that a short detention to investigate a serious crime

was permissible. In People v. Hicks, supra, the New York Court of Appeals, one year before this incident, specifically authorized such a detention for the purpose of a viewing by the victim. It is hard to imagine how the officers could believe their conduct to have been illegal in light of the Hicks case and in light of the Supreme Court's decision in Terry. Both cases would seem to authorize the very police action that occurred here.

The fact that other competent officers might have acted differently is not controlling. Under Robison, if reasonably competent officers could differ on the approach, an officer should not be penalized with potential civil liability for choosing one of the posible modes of action. Accordingly,

summary judgment must be granted in favor of the defendant officers of the Brighton Police Department.

D. Municipal Liability Under Section 1983

Neither a muncipality nor its supervisory police personnel may be vicariously liable for the actions of a policeman allegedly constituting a Section 1983 violation, unless the injured plaintiff can show the existence of an offical policy or custom that the municipality sanctioned or ordered. City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1203 (1989); Pembauer v. City of Cincinatti, 475 U.S. 469, 480 (1986); Monell v. Dep't to Social Services, 436 U.S. 658 (1978); Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986), cert. denied, 480 U.S. 922

(1987).

Plaintiff must also show a "causal link" between the alleged custom or policy and the allege Section 1983 violation and concomitant harm. In short, "a muncipality can be liable under Section 1983 only where its policies are the 'moving force behind the violation.'" City of Canton, 109 S.Ct. at 1205 (quoting Monell, 436 U.S. at 694). Vicarious or respondeat superior liability will not attach under Section 1983. Id. at 1203.

Moreover, "(o)nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a (municipal) 'policy or custom' that is

actionable under Section 1983." Id. at 1205. The Supreme Court has stated that it will not suffice "to prove that an injury or accident could have been avoided if an officer had had better or more training.... Such a claim could be made about almost any encounter resulting in injury." Id. at 1206.

Plaintiffs have alleged a policy here, but only in very conclusory terms. They appear to argue that insufficient training and supervision has caused the Town of Brighton's police department to harass black persons, because of their race, in violation of their civil rights.

Aside from the fact that plaintiff Dempsey (who is white) most likely has no cause of action in this regard, plaintiffs have not pointed to

sufficient evidence giving rise to an inference of policy. One statement of Chief Shaw which is singled out by plaintiffs--that suspects apprehended by Brighton police are not "under arrest" until they are so informed--does not represent a policy of the Town, nor does it appear to be a prescription for constitutional violations.(5)

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(5) In support of their motion for summary judgment, the municipal defendants submitted the affidavits of officers involved in this incident, as well as Thomas M. Voekl, a lieutenant responsible for staff services, including coordination of officer training. These affidavits set forth at length the Brighton Police Department's extensive training program, its procedures for responding to a bank robbery and its policies regarding a felong vehicle pull-overs and approaches, arrests and detention, and the use of firearms. Plaintiffs have not proffered any evidence to dispute the defendants' substantial evidence that its officers are properly training and supervised.
(...Continued)

In Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985), cert. denied, 480 U.S. 916 (1987), the Second Circuit reversed a district court for failing to dismiss a complaint arising out of a false arrest incident. The plaintiff in Vippolis made a showing that the defendant muncipality hired the offending officer knowing his training to be insufficient--but nonetheless was reversed because he made no showing that such deficient training was a general municipal policy:

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(5) (...Continued)

Nor have they specifically identified or offered proof of a custom or policy which authorizes police officers to harass blacks or to use excessive force in confrontations with citizens, particularly blacks.

> For a victim of police brutality to establish the requisite causal connection between his injuries and a municipal policy of inadequate training, he must make some showing that the specific deficiencies in the training given police officers led the misbehaving officer to engage in the alleged misconduct. The record contains no evidence concerning the police procedures covered by the training program to show, for example, that the program would have instructed (the officer) how to make arrests and how to subdue an abusive suspect....Under these circumstances, a jury could not rationaly find that the municipal defendants' failure (caused plaintiff's) injuries.

768 F.2d at 44-45.

Powell v. Gardner, 891 F.2d 1039, 1045 (2d Cir. 1989), presents a similar case. There, "a directed verdict in favor of the County on (the Section 1983 claim) was proper...because the record is devoid of evidence...that (plaintiff)

was injured as the result of a municipal custom or policy, and because we are unpersuaded that (plaintiff) was unfairly denied the opportunity to present such evidence."

I note that in the case at bar, as far as plaintiff's opportunity to present such policy evidence goes, plaintiff has submitted close to one thousand pages of depositions, memoranda and pleadings. Despite the voluminous submission, plaintiffs have failed to furnish any evidence of a municipal policy or custom. See Walden v. Wishengrad, 745 F.2d 149, 153 (2d Cir. 1984) ("(since plaintiff) has not pleaded or shown by affidavit any facts which indicate that her allegedly unconstitutional arrest was the product of official government policy....the

district court properly granted summary judgment"); Rodrigues v. Avita, 871 F.2d 552, 554 (5th Cir.), cert. denied, 110 S. Ct. 156 (1989) ("In 'cases invoking 42 U.S.C. Section 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations.'")

Finally, the only specific act illustrating the policy complained of by plaintiffs is the incident itself. This is not enough. A "single incident alleged in a complaint...especially if it involved only actors below the policy-making level, generally will not suffice to raise an inference of a custom or policy." Powell, 891 F.2d at 1045; Fiacco, 783 F.2d at 328. See also Rodriguez v. Avita, 871 F.2d at 555 (claim of inadequate police training

insufficient because the pleading "does no more than describe a single incident of arguably excessive force applied by one officer--a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else."

Plaintiffs have failed to produce any evidence as to deficient training and supervision except this single incident. Therefore, defendants' cross-motion for summary judgment is granted. Plaintiff's claims against the Town of Brighton and the Chief of Police, Eugene Shaw, are dismissed.

## E. Pendent State Claims

Plaintiffs also seek compensatory and punitive damages based on state law claims of assault, emotional distress, false arrest and detention, and malicious prosecution.(6) Having determined that plaintiffs' federal claims must be dismissed, and there being no diversity of citizenship between the parties, the court declines

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(6) In a Section 1983 action for malicious prosecution, as well as in a New York state tort action for malicious prosecution, the plaintiffs in order to prevail must establish four elements: "(1) that the defendants either commenced or continued a criminal proceedings against them; (2) the proceeding terminated in their favor; (3) there was no probable cause for the criminal proceeding; and (4) the criminal proceeding was initiated out of actual malice." Angel v. Kasson, 581 F. Supp. 170, 175 n.9 (N.D.N.Y. 1983)(citing

(Continued...)

to take jurisdiction of the state law claims. "It is well settled that 'if the federal claim are dismissed before trial . . . the state claims should be dismissed as well.'" Town of West Hartford v. Operation Rescue, No. 89-9051, slip op. at 6893 (2d Cir. October 10, 1990), citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). This decision is in keeping with the principle that "(n)eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of

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(6)(Continued...)
Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980)). Since no criminal proceeding was initiated or continued against plaintiffs, this claim must fail.

applicable law." Robison v. Via, 821 F.2d at 925. Accordingly, the plaintiffs' state law claims are dismissed.

## III. CONCLUSION

Plaintiffs' motion for partial summary judgment as to the issues of false arrest and excessive force is denied. Defendants' cross-motion for partial summary judgment on the issues of negligent training and supervision is granted. With regard to the plaintiffs' remaining federal claims, the Court grants summary judgment in favor of the defendants dismissing plaintiffs' federal claims and pendent state claims. Plaintiffs' action against all defendants is dismissed in its entirety.

The above shall be entered in both Civ. 88-726L and Civ. 88-930L.

IT IS SO ORDERED.

s/David G. Larimer
DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

DATED: Rochester, New York
October 29, 1990

# APPENDIX C

## EXCERPTS OF BRIGHTON POLICE RADIO TRANSMISSIONS FROM TAPES ON JUNE 12, 1987

P.2 The only description I have is a young black male wearing a blue jacket, unknown if a weapon was shown. Last seen heading towards the city of foot on Monroe Avenue.

P.4 770 for a description. Got a male black, he had dark sunglasses on, a blue hat, a burgundy shirt with long sleeves. Looks like a turtleneck.

P.5 What was the physical clothing description again, 70?

P.5 He had dark glasses on, blue hat, burgundy shirt with long sleeves and possibly a turtleneck.

I am trying to get some more here.

P.5 Uh, just before that description was put out, there was a vehicle, uh, a K-car

P.6 silver or gray K-car, went westbound, came off of Highland Avenue. Had two male blacks in it one which had either a maroon or burgundy style long-sleeve shirt on westbound on Monroe Avenue. I didn't see if they went down Culver Road or went westbound into the city. I am going down Monroe Avenue now westbound.

P.6 770, he is about 6'1", 6'2", very thin, blue jeans. He had a hat on, uh, one -- the other victim is saying it is tan with a strap underneath it, under his chin. No gun was displayed.

However, one was threatened.

P.11 You are looking for a male black, 6 foot, slim built, wearing a long-sleeved purple shirt, blue jeans, tan hat with a chin strap, sunglasses. Do not have a description on a vehicle. Last seen on foot towards the city on Monroe Avenue. A gun was threatened but none displayed.

P.11 Do you have any description of a vehicle?

P.12 Negative. Last seen on foot going around behind the bank on St. Regis. That is the last they saw of him.

P.12 Any facial hair.

P.12 Negative, No facial hair.

P.17 773, would the subject by any chance we wearing glasses?

P.17 Say it again.

P.17 773 to 70, was that subject wearing dark glasses by any chance?

P.18 That is affirmative, dark sunglasses.

P.18 Okay. A male black just jumped into a car. I am going -- he is going on Highland Avenue. Up by Chadbourne, male black. Had a blue --something blue on. I couldn't get a good look at him. I will be stopping him on Highland Avenue east of Chadbourne.

P.22 Purple shirt, blue jeans, tan hat with chin strap. Okay. I will be stepping out with a black male at Monroe and Silver. Blue jeans, blue shirt, tan jacket.

# APPENDIX D

THE FOLLOWING QUESTIONS AND ANSWERS ARE QUOTED FROM DEPOSITION TRANSCRIPT TESTIMONY AND REFERENCES ARE TO PAGES THEREOF

## EXCERPTS OF DEPOSITION TESTIMONY OF TROOPER KIM SMITH TAKEN ON SEPTEMBER 21, 1989

Q. Can you tell us in your own words what you observed?

A. I observed a black male standing on the corner. I believe he was holding something in his hand. I am not positive of that. He was dressed in -- all I can recall at this time is that it was kind of wild clothing, bright. The pants didn't match the shirt. They were both colored and printed in some way. (P.13)

Q And what directed your attention to this gentleman standing on the corner?

A. Just the color of the clothing; that it was loud clothing. It caught your attention. (P.15).

Q. His clothing, did it match the description over the radio that you were given of the culprit?

A. No, Sir. (P.15).

Q. Can you recall now as to how the description of the culprit that you were given over the radio matched up with the description of the gentleman who was standing on the corner?

A. No, sir. I recall at the time making the decision that he did not fit the description I had been given. I don't recall what the description I had been given

was. (P.15).

Q. With reference to the black man that you saw standing at the intersection, can you tell us whether he was on the grass in accordance with your recollection or on the sidewalk or on the curb?

A. I can't recall. I recall it appeared like he was waiting for a bus but there was no bus stop at that location. I don't know if he was on the paved sidewalk or on the grass on either side of the sidewalk. (P.16).

Q. At any time during your observation, did you see him come from behind some bushes?

A. No, he was standing in plain view the whole time. (P. 16-17)

Q. Were you able to hear their

radio communications?

A. Apparently that says I did -- let me read that again. Yes I had a scanner in my vehicle and I overheard Brighton PD had stopped a suspect vehicle. (P.33)

Q. Would you have been able to hear, then, the descriptions being given out by the Brighton police dispatcher?

MS. CECERO: If they were being given.

Q. If they were being given out?

A. Yes. (P.33)

EXCERPTS OF DEPOSITION TESTIMONY OF LISA ANN FIORDELISO DUNN (Bank Teller) TAKEN ON NOVEMBER 21, 1989

Q. Now, did you observe what type of clothing he had on?

A. Yes. He has on a purple

sweater with like black polka dots in it and it was a long-sleeved sweater, and I thought that was strange because it was warm. It was a warm day. (P.77-78)

Q. And what was the color, what was the principal color?

A. It was a purple with like black polka dots in the material. (P.78)

Q. He was clean-shaven, that is your best recollection?

A. Yes. (P.85-86)

EXCERPTS OF DEPOSITION TESTIMONY
OF SGT. FRANK MURRAY TAKEN ON
NOVEMBER 22, 1989

Q. Did you observe anybody standing at the corner?

A. When?

Q. During the time you were in the loop.

A. Yes, I did. (P. 141)

Q. And was he standing by the corner?

A. He was standing by the intersection. I thought he was standing at a bus stop. I don't know if he-- (P.142)

Q. Did you notice whether he had a beard or not?

A. I think he may have. (P.143)

Q. Well, did the person standing on the corner appear to have a description identical or similar to the person who they described as being the bank robber?

A. In my opinion, no. (P.144)

Q. It isn't necessary to arrest somebody to say, "You are under arrest"; am I right?

A. No. (P.165)

Q. Okay. So if these men had, in fact, handcuffs on them, they were under restraint, they were not free to go; am I correct?

A. If they were what you say, I would believe that to be correct, yes. (P.165)

Q. And that would in fact be an arrest; am I correct?

A. Yes. (P.165)

Q. Well, the information you had over the police radio gave you a description of the culprit who robbed the bank?

A. Yes. (P.167)

Q. And so you were able to formulate an idea as to whether the description of the culprit who robbed the bank was different than

the description of Mark Curenton, who was standing at the corner?

A. Yes. (P.167)

EXCERPTS OF DEPOSITION TESTIMONY OF EUGENE SHAW, CHIEF OF POLICE, TAKEN ON NOVEMBER 22, 1989

Q. And the Town of Brighton keeps use of force information in normal course of business; am I right? And I am referring to the police force.

A. Yes, sir. (P.208)

Q. Does an arrest require the words that "You are under arrest"?

A. I would say yes. (P.211)

Q. That is the point. But when you are pointing a gun at somebody, is it not a duty of the

police officer to advise them as to why they're being stopped?

A. No, sir. The duty of the police officer at at that time is, number one, protect himself. (P.215)

Q. Well, you say you have to use the word "arest";

A. That is correct. (P.219)

Q. And if you don't --

A. Yes, that is my terminology of arrest; that you must say "arest". (P.219)

Q. Well, do you make recommendations based on your experience?

A. I believe it is normal practice to say to anybody you take into custody that "Your are under arrest," because at that time you have to give him the Miranda rights so that they don't make a

statement that incriminates themselves. (P.221)

Q. Okay. Now, you have taken courses as to what constitutes arrest; am I right?

A. Been a long time, but I have. (P.223)

Q. And it's your testimony that you have to use the magic words "you are under arrest" before somebody actually is under arrest?

A. That is my thinking. (P.223)

Q. Okay. And is that the thinking of the police officers in your department?

A. I would hope so. (P.223)

Q. But he didn't tell you where he was when he first observed Murtagh Dempsey?

A. Mr. Dempsey here? (P.235)

Q. That is right.

A. I believe it was when the car stopped and Mr. Curenton came out and got in. I believe that was the first observation. (P.236)

Q. All right. What is the population of the Town of Brighton, approximately?

A. Probably between 35 and 40,000 people. (P.236)

Q. I see. So there are many blacks in Brighton, am I correct?

A. Blacks, Orientals, Indians. (P.236)

Q. And under the procedure, he would then wait for backup to arrive before he proceeds?

A. That would be the wise thing to do. (P.250)

Q. And that is the correct procedure,

am I right?

A. I believe it to be so. (P.250)

EXCERPTS OF DEPOSITION TESTIMONY
OF EDWARD MURTAGH DEMPSEY TAKEN
ON NOVEMBER 22, 1989

Q. Where was he standing when you first saw him?

A. Sidewalk. (P.284)

Q. The trooper, the State Police car that you saw parked in the bus loop, could you see the trooper who was sitting behind the wheel of that car?

A. I could recognize that there was a person in the car. (P.286)

A. *** All of a sudden I hear over a loudspeaker from his car you know, "Driver and passenger, raise

your hands." *** (P.290)

A. *** One of them is like four feet from my head with a pistol, *** (P.297)

A. And while he was holding on to me, another officer came around and frisked me, okay. After he said -- after he yelled. "farther, farther," then he approached me and he frisked me okay. (P.297)

Q. Before you were handcuffed?

A. Before I am handcuffed. Okay, so he frisked me, both legs; I mean everything. (P.297)

A. *** the heavy-set guy, steps on my hand while I am on the lawn, okay. And you know, my hands are out. I have got no shoes on. My hands are out. He stepped on my

hand. And this guy's not a light guy. I would say over 200 pounds or over, okay. (P.298)

Q. Are you saying that he purposely stepped on your hand?

A. Oh, yes. Intentionally, no accident, I mean, he stepped on my hand, so my hand wasn't going anywhere. Okay. And it hurt, too. I mean that is 200 pounds I got on my left hand. (P.298)

A. *** Steps on my hand and then reaches around with his right hand and grabs my right hand that is out to the side and yanks it back and pushed it flat against my back so it's in the middle of my spine. (P.299)

A. *** So he is grinding my palm down into the ground and he grabs,

then be bends over and all his weight is on his left foot, grabs by other hand and jerks it back. (P.300)

Q. You are sure that they searched you before they put the handcuffs on?

A. Positive. (P.302)

Q. And then after you were standing up what happened?

A. *** I am begging them to take the guns off me, because obviously they searched us; we had no weapons on us, okay? (P.302)

Q. So your best recollection is there were approximately how many officers with guns pointed at you?

A. I said six to eight when I started it and it's say six to eight until today. (P.304)

Q. How long do you think you were in handcuffs total?

A. Total period? I was in handcuffs for probably about 10 minutes. (P.314)

Q. Do you have any physical injuries which resulted from this injury?

A. That last us to this day? I mean -- no. I mean, two days afterwards my arm, from being jerked around afterwards, but not anything that --- (P.332)

*** And my seeing a psychologist about it at this point no, I am not, but that is going to be there for the rest of my life. *** (P.332)

Q. And you were angry that day when they detained you; is that

correct?

A. Oh, yes, I was very angry, but I maintained myself as a gentleman the whole time. There is not one of those police officers that could tell you that I behaved other than what I told you and I was gentleman-like. (P.333)

Q. You testified earlier that you were yelling at them.

A. *** "Please put your guns away." (P.333)

Q. All right. How many times between Monroe Avenue and the intersection where the bank is and the Monroe Highland intersection, how many times did he pull up and pull back?

A. I would say like two to three times he was driving parallel,

parallel with me, and then dropping back, and dropping back again. Okay. So two or three times before we were at the intersection where he did it for the last time, okay. (P.344)

Q. And at that point did you observe a State Trooper?

A. Yes, I did. (P.347)

Q. Was it a terrorizing experience?

A. Extremely. (P.350)

Q. All right. Now, when he stepped on your left hand, was that painful?

A. Yes, I mean, that was excruciating pain because he was -- I mean, he is moving around. The guy's got to move to reach over to grab my other hand, then shift his weight back onto where

by hand was on the ground. He shifted his weight when he reached down to grab my hand that he had his foot on, okay, so he is moving around. You are moving back and forth, yes, it was excruciating pain and it hurt. (P.350)

Q. How about your right arm?

A. That hurt also. That was excruciating pain because he jerked it, and I have -- that is not a position that you are in every day. I mean I had never been in it and my muscles are stiff, I am tense. I mean I am scared. And he grabbed that arm and he jerked it around behind my back. (P.350)

Q. Did you have any difficulty with your arm thereafter?

A. It was -- I mean, I could feel it for you know, a couple days after that. (P.351)

Q. *** approximately how may times did you ask the officers or beg them to remove the guns?

A. I had to ask them at least eight times. (P.353)

Q. Was having those guns on you, was that one of the most ---

A. That was the most terrifying part of the whole thing, especially the one that was four feet from my head after I was handcuffed. (P.353)

EXCERPTS OF DEPOSITION TESTIMONY OF OFFICER THOMAS SLEEP TAKEN ON NOVEMBER 27, 1989

Q. So in other words, I do have

the sum total of the dispatcher tape and the radio tapes for the date of the bank robbery?

A. Yes (Jane Conrad). (P.388)

Q. Would you tell me exactly what the description was on that radio tape in accordance with your recollection?

A. Male, black with a blue jacket. (P.391)

Q. Do you know on the day of the bank robbery, did you see any black people other than Mark Curenton?

A. Every day. (P.393)

Q. Quite a few, right?

A. Yes. (P.393)

Q. *** All right. What did you hear in the second description?

A. Generally male black, height

description approximately six foot. Thin build. I believe he had a blue hat on. Burgandy long-sleeves shirt, turtleneck I believe. Blue jeans. (P.409)

Q. --- sleeve shirt, blue jeans, anything else?

A. Dark sunglasses, I believe. (P.410)

Q. All right. Give any description as to whether this man was shaven or did he have a beard and mustache?

A. At that particular point there was no transmission about facial hair?

Q. Anything about carrying a bag or any descriptions?

A. Not that I recall, sir. (P.411)

Q. Did the description -- the

first or the second -- ever involve a motor vehicle description?

A. No vehicle. (P.411)

Q. Do you understand the word, what is your understanding of arrest?

A. When you tell somebody that they are under arrest. (P.416)

Q. Oh, you must tell them?

A. That is correct? (P.416)

Q. What was the shirt color described in the third description?

A. I believe it was purple, sir. (P.421)

Q. Now, at any time in the first, second, or third description did you have any information whatever, from any person whatever, that

there was an automobile involved in the robbery at the Monroe Savings Bank?

A. No, sir. (P.421)

Q. I am trying to find out when you first saw Murtagh Dempsey's car?

A. Mr. Curenton go into it. (P426)

Q. That is the first time you saw it?

A. First time I became aware of it. (P.426)

Q. At any time when you saw that car did he change lanes?

A. When I first became aware of the car it was stopped. (P.427)

Q. Now, is it your testimony that at no time prior to that time did you see Murtagh Dempsey's blue car?

A. That is correct, sir. I may

have -- (P.433)

Q. Well, at what point did you believe in your mind that he was connected with the Monroe Savings Bank robbery?

A. My attention was first brought to Mr. Dempsey's car when Mr. Curenton got into the car, sir. (P.436)

Q. Where was Mark Curenton when you first saw him?

A. He was walking through some low bushes near the intersection of Monroe and Highland generally in a southeasterly direction, walked across the sidewalk and got into the right front of Mr. Dempsey's car. (P.438)

Q. He was walking through the bushes?

A. When I observed him. (P.438)

Q. What was the sole basis for suspecting Murtagh Dempsey?

A. The male black that was entering the car. (P.439)

Q. So it was because of him being involved with a black man that created your suspicion, is that right?

A. That is correct, sir. (P.439)

Q. Now, when you saw Mark Curenton can you describe what you observed with reference to him physically and then his clothing?

A. Male black, had some blue on. (P.439)

Q. Where was his blue?

A. On his shirt area. (P.439)

Q. The sleeves?

A. When I saw him it was just -- he was moving. It was just out

of the corner of my eye I saw him. (P.439)

Q. Was that sufficient in your mind to make him a suspect?

A. I believe that the gentleman had some glasses. (P.440)

Q. What kind of glasses?

A. I don't recall. (P.440)

Q. And you also confirmed that he had large sunglasses on, the culprit, the real culprit?

A. The description was dark sunglasses. (P.440)

Q. Did you ever make an effort to look at his glasses?

A. No, sir, because the total sum that I saw -- the first time that I saw him was only a few seconds. (P.441)

Q. Do you recall whether he was

clean shaven or whether he had a beard and mustache?

A. I don't recall, sir. (P.441)

Q. Well, is it not a fact that he had a white shirt on?

A. I don't recall, sir. (P.442)

Q. Do you recall whether he had long sleeves or short sleeves?

A. I don't really recall. (P.442)

Q. Do you recall what color his pants were? (P.442)

A. I don't really recall because of the -- as I indicated I just saw him briefly, he was walking, he got into the car, and probably only at the angle I was looking and when he got into the car I could probably only see from the waist area up. (P.442)

Q. I see, because there were cars

over to your right; is that correct?

A. That is correct. (P.442)

Q. So in order to see this suspect you had to look through a lane of traffic and see Mark Curenton and you saw him from the waist up?

A. Basically, yes. (P.443)

Q. Did you note when you arrested him what color his shirt was?

A. I did not, sir. (P.444)

Q. Did you note whether he was shaven or had a beard?

A. No, Sir. (P.444)

Q. He came through the bushes. Do you recall what part of the bushes he came through?

A. No sir. (P.445)

Q. When he came through the bushes was he crawling, was he

standing up straight?

A. He was walking, sir when I first observed him. (P.445)

Q. Was he walking, was he walking fast?

A. He was walking, not running. (P.445)

Q. Did you get an impressionas to what his height was at that time?

A. No, sir, because I only saw him for a few seconds. (P.445)

Q. Who was the witness you talked to at the bank?

A. I didn't talk to anybody at the bank, sir, we're going back to the radio transmissions of the descriptions. (P.448)

Q. So the sum total of your concept that you received about the culprit was from the radio

transmissions; is that correct?

A. That is correct. (P.448)

Q. All right. From your description both these people are lying on the ground, right, Mark Curenton and Murtagh Dempsey. Now you had a very clear view then of all the clothing that Mark Curenton was wearing, am I right?

A. That is correct, yes. (P.498)

Q. Did he have a hat?

A. Not that I recall. (P.498)

Q. Did he have a beard?

A. I couldn't see his face. (P.498)

Q. Did he have a mustache?

A. I don't recall. (P.498)

Q. Do you recall what shirt he had on?

A. I believe it was a blue and white shirt. (P.498)

Q. All right. What was the color of that pants, those pants?

A. Best of my recollection, I think maroon. (P.499)

Q. Did you evaluate at that time as to whether Mark Curenton then matched up with the information that you received on the police radio on the first and second or even the third time as to whether the clothing that Mark Curenton had on was the same as the culprit?

A. The initial descriptions were all scattered. So ... (P.499)

Q. Would you just answer the question, please.

A. The clothing was not exactly as described on the radio. (P.500)

Q. You don't know whether they

were sunglasses or not?

A. I only saw him briefly as he was getting into the car. (P.501)

Q. When you saw him there at the scene did he have glasses on?

A. I don't recall, sir. (P.501)

Q. What were the color of his pants?

A. Pants as he was lying on the ground were maroon, the description was jeans. (P.501)

Q. But in the description, either one, two or three it was not maroon; is that correct?

A. That's correct. (P.502)

Q. Well, you came to a conclusion that what you saw him wearing or the culprit was described to be wearing were at variance; is that correct?

A. Yes, there was a variance. (P.502)

Q. All right. Now, with a variance like that, why did you not release Mark Curenton right at that point?

A. At this point Sergeant LaRonde has arrived and at this point he was in charge.(P.503)

Q. Tell me what happened then. How were they subdued?

A. I don't -- they weren't struggling or anything. (P.504)

Q. But at some point they were patted down, is that right?

A. That is correct. (P.506)

Q. And you found no weapons, is that correct. Nothing whatever?

A. Yes. That is correct. (P.506)

Q. But they still continued to be handcuffed, is that right?

A. I believe so, yes. (P.506)

Q. And they still complied with

all the requirements you made and all the requirements of any of the officers of the Brighton police force?

A. To the best of my knowledge. (P.506)

Q. Now, what time was it when Mark Curenton was taken back to the bank for a showup?

A. Sometime after 2:30.

Q. So that would be over an hour, am I correct after the bank was robbed is that correct?

A. That is correct. (P.510)

Q. Is it not a fact that the rules promulgated by the Town of Brighton Police Department and the CPL require on a showup that somebody be taken back for a showup within a frame of 45

minutes?

A. That is correct. (P.510)

Q. Does that facial description, does that -- does Mark Curenton appear like that man that you did the composite of?

A. I only saw him briefly. I couldn't tell. (P.515)

Q. Would you answer the question, please?

A. I don't really recall, sir. I never got a very good look at his face he was getting into the car. (P.515)

Q. Well, what was wrong with communicating through the hailer telling him why they were stopped?

A. Quite frankly, I don't know whether or not it works on that car at that particular point in

time. (P.518)

EXCERPTS OF DEPOSITION TESTIMONY
OF OFFICER FREDERICH MELLINI
TAKEN ON NOVEMBER 27, 1989

Q. So if you had your heard these transmissions there is nothing on there about a blue car, am I right?

A. Right. (P.537)

Q. How do you know it only took 13 minutes?

A. Because the time of the stop was 1429. (P.548)

Q. Both, he physically handcuffed both parties, is that right?

A. Yes, sir. (P.552)

Q. But in any event when you arrived there neither of these parties were free to go, is that right?

A. Right. (P.554)

Q. They were being held because they were handcuffed, they were lying on the ground, and there were guns pointed at them, correct?

A. Correct. (P.555)

Q. All right. Now, when you were at the scene here, did you observe Mark Curenton on the ground?

A. Yes I did. (P.560)

Q. Maroon pants?

A. Yes sir. (P.560)

Q. All right, would you describe the shirt that he was wearing?

A. It was blue with -- I don't recall if the sleeves were white or the shirt itself was white with blue sleeves. But it was a blue and white shirt. (P.561)

Q. And when you saw Mark Curenton on the ground you are indicating that his clothing was considerably different than the description that was given to you by the sergeant; is that correct?

A. It was different from, yes.

(P.564)

Q. More than an hour?

A. By minutes, yes, could be.

(P.566)

Q. All right, now, if I put all those three elements together, a black man, first, he is a black man, he is going over some bushes, and he gets into a car being operated by a white man; those three observations, are those sufficient in your opinion to make a felony arrest?

A. No. (P.572/573)

Q. I am talking to you as an expert police officer who is well trained in the requirements of arrest. You said these individual elements would not give sufficient background to make a felony arrest?

A. For a felony stop, no. (P.574)

Q. Did you ever hear Murtagh Dempsey begging that they remove the guns?

A. In the very beginning. (P.582)

Q. What did he say?

A. He wanted the guns out of there. (P.582)

EXCERPTS OF DEPOSITION TESTIMONY
OF OFFICER WILLIAM LARONDE
TAKEN ON NOVEMBER 27, 1989

Q. All right. But those four people were there at the time, am I right?

A. Yes, they were. (P.632)

Q. And were you the fifth person?

A. or sixth. (P.632)

Q. Fifth or sixth?

A. Yes. (P.632)

Q. Well, did he follow the instructions?

A. Basically, yes. (P.639)

Q. Was he wearing glasses?

A. Yes, he was, I believe. (P.653)

Q. Were they sunglasses?

A. No, they were not. (P.653)

Q. Do you know what kind of shirt he had on?

A. It was a light-colored shirt.

(P.654)

Q. White?

A. Could be. (P.654)

Q. What do you mean by "ball park description"?

A. We had a description anywhere from 5'7" to six foot tall. And I believe. (P.659)

Q. If the culprit is described as wearing a polka dot shirt and the man who's described in wearing a white shirt and the pants are maroon and not blue, does that fit within the ball park?

A. There was -- well no. (P.659)

Q. Mark Curenton didn't have a jacket, right?

A. No, he had 45 minutes to take it off. (P.659)

Q. Do you have to use the magic

words of "you are under arrest" before a person is actually arrested?

A. No. (P.663)

Q. Do you often see blacks on Monroe Avenue in the Town of Brighton?

A. Yes, we do. (P.673)

Q. Seeing a black man getting into a car, is that sufficient?

A. No. (P.688)

EXCERPTS OF DEPOSITION TESTIMONY
OF OFFICER ROBERT HICKEY
TAKEN ON NOVEMBER 27, 1989

Q. Was he wearing sunglasses?

A. No, I don't think so. Clear glasses, I think. (P.752)

Q. How many people have you hand-

cuffed since June 12, 1987?

A. Maybe 1000. (P.761)

Q. Well, it's not unusual to see a black man in the Town of Brighton?

A. Oh, no. (P.765)

Q. All right. Now, we're coming back to the point of you handcuffing Mark Curenton and Murt Dempsey. Can you tell me now who did you handcuff first?

A. I don't recall. (P.765)

Q. Well, how much do you weigh?

A. about 215. (P.772)

Q. They did exactly what they were told to do, is that right?

A. Yes.

Q. Did he comply with Officer Sleep's instructions?

A. As best I can remember. (P.774)

Q. Is it not a fact with reference to Murt Dempsey that you stepped on his left hand while he was having it spread out to the side?

A. I don't recall that. (P.779)

Q. Do you recall whether or not you stepped on his hand?

A. I don't recall.

Q. Did you pull his right hand and arm up over his back while he was spread eagle lying face first on the ground, in accordance with the instructions of Officer Sleep?

A. Did I pull his -- which hand, his right hand?

A. I don't recall. (P.781)

Q. Did both of these parties, namely Murt Dempsey and Mark Curenton, comply with your request?

A. Did they comply with my request?

Q. Yes.

A. In the way they were handcuffed? (P.785)

Q. Whatever you instructed them to do?

A. As best I can recall, yes. (P.786)

Q. Promptly?

A. Well, yes, as best I can recall they complied, yes. I didn't have a physical struggle as I can recall. (P.786)

Q. I see. Neither from Mark Curenton nor Murt Dempsey?

A. No. Not that I can recall. (P.786)

Q. But when he couldn't leave he was under arrest. Is that correct?

A. Well, he was being detained. (P.794)

Q. What is the difference between being detained and being arrested?

A. I don't know. I guess that is a court decision there. He was being detained. He was being detained. (P.794)

Q. I am asking you as a police Officer?

A. I don't know. (P.794)

Q. But in any event, did Murtagh Dempsey give you permission to search the car?

A. Not that I recall. (P.801)

Q. And if you had an illegal arrest would you have a right to search the car?

A. I Don't know. (P.802)

EXCERPTS OF DEPOSITION TESTIMONY
OF LT. THOMAS M. VOELKL
TAKEN ON NOVEMBER 27, 1989

Q. So that would be in 1987, as I add these up, 38 persons who are police officers?

A. I think we -- our strength was 39 or 40 but we have a chief, too. (P.830)

Q. Are there any police officers today who are black?

A. No. (P.830)

Q. Are any of those police officers or any other employees black?

A. No. (P.832)

Q. Has the Brighton Police Department ever employed any blacks?

A. None that I can recall. (P.832)

Q. What is the Brighton Police Department's policy with reference to the employment of black people?

A. Equal opportunity employer. (P.833)

Q. What was the description of his clothing?

A. The person that I stopped. (P.871)

Q. Yes.

A. --or that I came across. He had on a dress, combat boots. (P.871)

Q. Tell me exactly what you did and with whom?

A. I believe Officer Sleep made an observation of the individual who was known to me personally. And -- (P.872)

Q. Well, how did he get involved in this person?

A. He observed the individual coming out of the bushes or something by the bus loop. Sleep, I believe, we just passing by or had seen him. He stated on the air that he had observed the individual. And at that point I was almost at the intersection of Monroe and Highland. I just turned left and I was right on top of him. (P.874)

Q. Now, you say that the first alert came from Thomas Sleep; is that correct, with reference to this person?

A. Yes, he made the observation. (P.886)

Q. Okay, give me all the reasons

in your counsel's words, why this suspect was stopped?

A. The suspect was a black person. (P.887)

A. ***And my own personal knowledge of his personality characteristics. I would make an assumption that based on his past performance he would be very capable of doing such a thing. (P.888)

Q. Isn't it very common to see black men in the Town of Brighton?

A. Sure. (P.889)

EXCERPTS OF DEPOSITION TESTIMONY
OF DOROTHY TESTA TAKEN ON
NOVEMBER 27, 1989

Q. Facing west. Can you describe

the car?

A. It was a medium blue, not a large car, but not one of those small ones. An average-size car. (P.1010)

Q. And it wasn't a dark blue car; is that correct?

A. No. (P.1011)

Q. I see. Did you observe anybody get into the car?

A. Yes. Somebody came across my lawn that I observed from the window to my right. Going, coming across my lawn, coming, getting into the car and taking off. (P.1012)

Q. So you have no way of knowing whether he was black or white?

A. No. (P.1013)

Q. Does this exhibit which I

have given to you which is Exhibit 21, does that refresh your recollection as to what you said to the investigating officer at that time?

A. I may have forgotten all, you know. (P.1022)

Q. But I direct your attention to the third line which says, "On the date in question Testa observed a small medium blue two-door vehicle running"?

A. Yes. (P.1022)

Q. All right. But in essence what this officer did was take down your statement?

A. Yes. (P.1023)

Q. So, and at that time did you tell him that it was a medium two-door vehicle?

A. Yes. (P.1023)

EXCERPTS OF DEPOSITION TESTIMONY
OF INSPECTOR JAMES G. PATTERSON
TAKEN ON APRIL 24, 1990

Q. Are you aware that he made a statement that a person is not under arrest unless the police officer tells him he is under arrest?

A. I am not aware of that. (P.1069)

Q. Can a person be under arrest and not be told?

A. Certainly. (P.1068)

Q. Under what circumstances?

A. When you deprive him of this liberty and freedom of movement. (P.1069)

Q. In other words, you don't agree with the statement of Eugene Shaw when he says that you are not under arrest unless the police officer tells you that you're under arrest?

A. No, I do not agree with that statement. (P.1070)

Q. And in that case, Terry versus Ohio, the plainclothes man watched the suspects for a long period of time, am I right?

A. That is correct. (P.1081)

Q. And that didn't involve a fleeting glimpse, did it?

A. No, it didn't. (P.1082)

Q. Okay. In your opinion, as an expert, is it proper to pick up somebody merely on the conclusion that somebody has the capacity to

rob a bank even though you have no other objective evidence to that effect?

A. No, that would be improper, sir. (P.1088)

Q. Are you aware that counsel has stipulated that that transcript is an accurate transcription of this tape?

A. I am now. (P.1099)

Q. Can you tell me what is the meaning of "excessive force"?

A. Force that is unreasonable. (P.1127)

Q. ...All right do you know how much Officer Robert Hickey weighs?

A. I believe I read that he weighed 210 pounds. (P.1127)

Q. Mmm-hmm. And do you know whether or not he stepped with his

full weight on the left palm of the hand of Edward Murtagh Dempsey while he was lying on the ground without being advised as to why he was even stopped?

A. I don't know that he was stepped on, no. (P.1128)

Q. And do you know whether -- do you know that his right arm was vigorously wrenched behind his back which caused Mr. Dempsey excruciating pain?

A. No. I don't know that. (P.1128)

Q. Would that be deemed excessive force?

A. Maybe. Sometimes. (P.1128)

Q. Sometimes. You're not sure?

A. I am sure. Because you

haven't made you know suppose he was resisting. (P.1128)

Q. Well, he wasn't resisting and if you read you'll know that these people complied with the orders of Thomas Sleep to the letter. Even though they didn't know what was -- why they were stopped.

A. Well, interestingly you weren't there either. So you don't know what happened other than what your client told you. (P.1129)

Q. Well, when do you cross the line of excessive force? These people were not resisting, they were doing exactly what they were told to do.

A. Excessive force would be those

instances when, being shown no resistance by an individual that you're handcuffing, you were to do something that could cause them pain, serious pain and that it was uncalled for and unwarranted in a situation, yes. (P.1130)

Q. Like stepping on a man's hand such as Edward Murtagh Dempsey?

A. Sure, if the individual wasn't offering any resistance, was offering no resistance, was complying with all your commands. To wantonly step on somebody's hand to inflict pain, yes, that would be gross miscarriage of your duties . . . (P.1130)

Q. What?

A. Gross miscarriage of your duties. (P.1130)

Q. How about pulling up a man's right arm to cause him excruciating pain?

A. Absolutely, that would be terrible. (P.1130)

Q. That would be terrible?

A. Yes, sir. (P.1130)

Q. All right. Now, is handcuffing a use of force?

A. Absolutely. (P.1131)

Q. Is requiring somebody to lie on the ground, is that a use of force?

A. Sure.

Q. At gunpoint?

A. Yes. (P.1131)

Q. Were these people free to go?

A. Under those circumstances, no, they weren't. (P.1132)

Q. Okay. I understand what you

say, but all I am trying to do is get from you when you said you relied on defendants' memorandum you're saying you didn't rely on that memorandum is that right?

A. You got it. (P.1180)

Q. So this is false?

A. That is right. Absolutely. (P.1180)

Q. Okay.

A. That is a false statement. (P.1180)

Q. MR. KENNING: Counsel, will you stipulate that I have never been furnish with a copy of Exhibit 38.

MS. CONRAD: Yes, of course.

MR. KENNING: Will you furnish me with a copy of Exhibit 38?

MS. CONRAD: No. (P.1182)

MS. CONRAD: Let the record reflect that I have provided Mr. Kenning with the fact portion of Exhibit 38 which is part of the draft of our brief which was submitted to the court in final version on Wednesday, April 18th. (P.1185)

Q. Okay. Now, you haven't viewed this intersection have you.

A. No, sir. (P.1215)

Q. White hearts or bleeding hearts are not a defense, is that right? That is stated in case law, right?

A. Listen, no matter how well-intentioned the officer is, right, he just can't stop everybody that he feels like stopping. I will be the first one to agree with that.

(P.1221)

Q. All right. Assuming for the purposes of this question that there was an arrest and the arrest was not lawful, would it have been lawful for the police officers to then search Edward Murtagh Dempsey's car and his gym bag?

A. No, it would not. (P.1267)

Q. Okay. So we agree. And would that be a violation of the Fourth Amendment of the United States Constitution?

A. Yes, sir. (P.1266)

APPENDIX E

OPINION OF PLAINTIFF EDWARD MURTAGH DEMPSEY'S EXPERT, PETER L. GIORGIONE, DATED JANUARY 29, 1990 AND FILED IN ACCORDANCE WITH THE ORDER OF MAGISTRATE KENNETH R. FISHER DATED NOVEMBER 7, 1989. (DOCKET 51)

PETER L. GIORGIONE

FORMER POLICE OFFICER OF THE CITY OF ROCHESTER POLICE DEPARTMENT HAS BEEN CONSULTED IN BEHALF OF THE PLAINTIFF EDWARD MURTAGH DEMPSEY TO GIVE AN OPINION AS AN EXPERT AT THE TRIAL OF THE FIRST ABOVE CAPTIONED LAW SUIT PENDING IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT ROCHESTER, NEW YORK.

QUALIFICATIONS

I, Peter L. Giorgione, was born in Rochester, New York, and now reside at 100 Glenthorne Road, Rochester, New York 14615. I graduated from the Rochester Police Academy in September 1968, and during the period of time from 1968 to 1970 I took courses at Monroe Community

College and was awarded an Associates Degree in Police Science. I was appointed as a police officer by the City of Rochester Police Department in September 1968, and was employed as a full time police officer by the Rochester City Police Department from September 1968 until September 1979, except for a nine month period during the year of 1979 when I worked as an Investigator for the Gates Police Department. During the time I was an active police officer of the City of Rochester, in addition to my formal education at the Monroe Community College and the Rochester Police Academy, I took several seminars in the following categories:

1. Federal Bureau of Investigation
2. Alcohol, Tobacco and Firearms

Agency

3. Secret Service Agency

4. Federal Drug Enforcement Agency

During the time I was actively employed as a police officer, my principal duties involved patrol, investigation, vice squad and intelligence work, and during the time that I was a police officer, along with education and training, it was necessary for me to learn the principles of law set forth in the Criminal Procedure Law of the State of New York.

SOURCE OF FACTUAL INFORMATION UPON WHICH MY OPINION AS A POLICE OFFICER IS BASED, AND UPON WHICH I PLAN TO BE CALLED AS AN EXPERT WITNESS IN BEHALF OF THE PLAINTIFF EDWARD MURTAGH DEMPSEY AT THE TRIAL OF THE WITHIN ACTION AT THE UNITED STATES DISTRICT COURT.

In the first instance, I was

called by Charles B. Kenning, Attorney, and conferred with him with respect to the facts and the circumstances pertaining to the bank robbery of the Monroe Savings Bank and the arrests of Edward Murtagh Dempsey and Mark Curenton thereafter which occurred after the robbery of the Monroe Savings Bank at 1627 Monroe Avenue at 1:32 p.m. on June 12, 1987. It is my belief that the City of Rochester Police Department and the Town of Brighton Police Department and the New York State Police Department are generally governed by the same standard of conduct as are set forth in the New York State Criminal Procedure Law with some variations which may be designated as General Orders, but I have been trained in my capacity as a police officer with respect to the law of

arrest and the limitations on police officers, of the City of Rochester Police and the Town of Brighton Police and the New York State Police, including the 4th Amendment in the Bill of Rights of the United States Constitution, and in particular guarantees to citizens under the 4th Amendment which protects the citizens of this country from unlawful searches and seizures, as well as the 14th Amendment of the United States Constitution which I understand guarantees the right of equal protection under the law to all persons regardless of race, as applicable in this case, being the rights of Edward Murtagh Dempsey, a white man, and Mark Curenton, a black man, whose persons were seized by Officer Thomas Sleep of the Brighton Police Department and other Brighton

Police Officers.

In connection relating to an opinion herein, a copy of the following papers were given to me for examination by Charles B. Kenning to enable me to understand what happened on June 12, 1987 and to render my opinion in preparation for being called as an expert witness at the trial of the within action in the United States District Court.

1. Transcription of Radio Transmission tape (EXHIBIT 10 - dated 11/27/89).

2. Transcription of Radio Dispatcher Tape (EXHIBIT 11 - dated 11/27/89). The transcriptions which I was given for reading and examination, were certified to by

Joseph Q. Inquagiato, Court Reporter.

3. Copy of proposed Second Amended Complaint dated December 26, 1989.

4. Copy of excerpts of deposition testimony of Mark Curenton taken on February 17, 1988.

5. Copy of excerpts of deposition testimony of Officer Thomas Sleep, Officer Robert Hickey and Officer Frederich Mellini taken on February 17, 1988.

6. Copy of excerpts of deposition testimony of Trooper Kim Smith of the New York State Police as a non-party witness taken on September 21, 1989.

7. Copy of excerpts of deposition testimony of Sgt. Frank Murray of the New York State

Police as a non-party witness taken on November 22, 1989.

8. Copy of excerpts of deposition testimony of Officer Thomas Sleep taken on November 27, 1989.

9. Copy of excerpts of deposition testimony of Officer Frederich Mellini taken on November 27, 1989.

10. Copy of excerpts of deposition testimony of Officer Robert Hickey taken on November 27, 1989.

11. Copy of excerpts of deposition testimony of Sgt. William LaRonde taken on November 27, 1989.

12. Copy of excerpts of deposition testimony of Chief of Police Eugene Shaw taken on November 22, 1989.

13. Copy of excerpts of deposition

testimony of Lt. Thomas Voelkl taken on December 15, 1989.

In addition I also examined the following exhibits from depositions.

1. EXHIBIT 1 - Xerox copy of a bank camera picture of the person who robbed the Monroe Savings Bank.
2. EXHIBIT 2 - Copy of statement taken by Investigator C.A. Galletta of the Brighton Police Department.
3. EXHIBIT 3 - Copy of Federal Bureau of Investigation report dated 6/22/87 containing a statement by Lisa A. Fiordeliso and signed by Steven A. Donaway.
4. EXHIBIT 4 - Composite of the bank robber dated 6/12/87 complet-

ed by Officer Thomas Sleep.

5. EXHIBIT 5 - Copy of Federal Bureau of Investigation report dated 6/22/87 containing statement by Jerilyn Silveri and signed by Barry Marsh.

6. EXHIBIT 7 - Copy of letter dated June 15, 1987 directed to Eugene Shaw, Chief of Police of the Town of Brighton.

7. EXHIBIT 14- An enlarged color photograph of the intersection of Monroe Avenue and Highland Avenue in the City of Rochester showing the sidewalk at the corner and bushes which appear to be approximately 2 feet high.

8. EXHIBIT 15- An enlarged color photograph showing the side-

walk and low bushes on the Highland Avenue side of the townhouse complex on the corner of Monroe Avenue and Highland Avenue.

9. EXHIBIT 16- An enlarged color photograph showing the corner of Highland Avenue and Monroe Avenue in the City of Rochester with bushes appearing to be approximately 2 feet high.

10. EXHIBIT 17- Copy of confession of Franklin Charles Leonard dated July 25, 1987.

11. EXHIBIT 18- List of Brighton Police cars and Officers assigned to those police cars, from Jane Conrad, Attorney, dated December 4, 1989.

12. EXHIBIT 19- Copy of letter dated December 4, 1989 from

Jane Conrad, Attorney, directed to Charles B. Kenning, Attorney.

13. EXHIBIT 21- Copy of investigation report of Gary A. Cuilla dated 6/12/87.

Based on the foregoing information, including the exhibits which I have examined, a copy of the Second Amended Complaint, consultations with Charles B. Kenning, Attorney, and examination of the dispatcher and radio transmission tapes, and excerpts of deposition testimony, I render the following opinion:

PROBABLE CAUSE

It appears that the bank robber of the Monroe Savings Bank Branch was a clean shaven black man, did not display a weapon at the time of the robbery,

fled alone on foot, and no automobile or other persons were involved in the robbery. Officer Thomas Sleep alerted fellow officers of the Brighton Police Department while he was in the City of Rochester that there was a black man north of the bus loop at the intersection of Monroe Avenue and Highland Avenue in the City of Rochester. At the suggestion of Officer Thomas Sleep this black man who was wearing women's clothing and did not match any description on the radio transmission tape, which was the sole source of information according to the statements of Officer Thomas Sleep, was picked up and taken back to the scene of the robbery at the Monroe Savings Bank within ten (10) minutes after the robbery, and identifications by eye

witnesses did not indicate involvement of this first black man to be stopped in the bank robbery. It does not appear that the Brighton Police, based on the radio transmissions, had probable cause to suspect or to associate the first black man wearing women's clothing as the bank robber, since he was more than one-half mile north of the bank within a short time after the robbery, and Lt. Thomas Voelkl returned this first black man to the scene of the bank robbery based on his belief that this black man was capable of committing such a crime because of his knowledge of other arrests of the first black man, but the evidence, particularly the lack of similarity between the Brighton Police radio police broadcast of the descriptions, and this first black man did not

match the descriptions of the bank robber. Lt. Thomas Voelkl's belief that this black individual would have the capability of committing the crime, would not give probable cause to take him back to the scene of the robbery as a suspect.

Officer Thomas Sleep states that he observed two black men in a Crysler K Car, apparently when he was in the City of Rochester, and went as far as the intersection of Monroe Avenue and Goodman Street, which I know is more than one mile from the Brighton Townline within the City of Rochester, and Officer Thomas Sleep gave up the search when he could not locate these two black men. There is no showing that either of these two black men matched the description of the bank robber as

broadcast by the Brighton Police Radio dispatcher, which was the only source of description information for Officer Thomas Sleep. In accordance with proper police procedures, if Officer Thomas Sleep intended to question, stop, detain or arrest these two black men in the Crysler K Car as being suspects in the crime, he should have called for backup in the City of Rochester. It does not appear that he requested any backup, which could have been readily furnished by the Rochester Police Department in accordance with normal procedures followed by other towns adjoining the City of Rochester. It is difficult to understand why Officer Thomas Sleep could not recall the route that he took in returning from Goodman Street and Monroe Avenue in the City of Rochester

to the Town of Brighton after he could not locate the two black men in the City of Rochester.

Thereafter, and approximately one hour after the robbery, according to the statements of Officer Thomas Sleep, he was proceeding in the passing lane going in a northwesterly direction on Monroe Avenue when he saw a black man (Mark Curenton) get into the passenger side of the four-door dark blue Toyota sedan of Edward Murtagh Dempsey at the corner of Monroe Avenue and Highland Avenue in the City of Rochester. He states that he was behind the car of Edward Murtagh Dempsey which was stopped in the curb lane, while Officer Thomas Sleep was in the adjoining passing lane. Officer Thomas Sleep claims that his first notice of the blue four-door Toyota was

at a time when a black man got into the passenger side of the automobile which was operated by Edward Murtagh Dempsey, and that he saw the black man get into the car of Edward Murtagh Dempsey out of the corner of his eye, and this occurrence was described by the Chief of Police Eugene Shaw as a "fleeting glimpse." Officer Thomas Sleep claims that this black man (Mark Curenton), who appeared to be the fourth black man who Officer Thomas Sleep decided to stop or cause to be stopped as a suspect, at the instant he saw a black man getting into the dark blue four-door Toyota of Edward Murtagh Dempsey and saw only the top half of the fourth black man, who is Mark Curenton. The radio dispatcher tape containing the descriptions which Officer Thomas Sleep claims to be his

only source of descriptions of the bank robber, do not reasonably match up in any way with the Brighton Police Department dispatcher tape descriptions of the bank robber and Mark Curenton, except only that both Mark Curenton and the bank robber were black. Officer Thomas Sleep claims that he had probable cause to stop the black man because the black man (Mark Curenton) appeared to be walking through the bushes which were two feet high; that a white man (Edward Murtagh Dempsey) was operating a dark blue four-door Toyota and stopped at the corner of Monroe Avenue and Highland Avenue in the City of Rochester and picked up his co-worker Mark Curenton who is black, and that a bank robbery had occurred in the vicinity approximately one hour before. The most

credible statements with respect to whether or not there was probable cause to question, stop, detain or arrest Mark Curenton and Edward Murtagh Dempsey, would be based on the eye witness statements of Trooper Kim Smith and Sgt. Frank Murray of the New York State Police, each of whom saw Mark Curenton while he was standing on the corner of Highland Avenue and Monroe Avenue, and both of whom apparently heard the same descriptions of the bank robber as given over the Brighton Police Radio. These two State Troopers did not conclude that Mark Curenton was a suspect in spite of their lengthly observations of Mark Curenton while he was standing on the corner, nor do their statements show a claim by Officer Thomas Sleep that Mark Curenton was walking through the bushes

which are approximately two feet high on the townhouse property in the City of Rochester. In view of the testimony of Trooper Kim Smith and Sgt. Frank Murray, there is no support for the statement of Officer Thomas Sleep that the black man appeared to be walking through the bushes when he was seen out of the corner of the eye of Officer Thomas Sleep. It is noted that there was no car or white man included in the description which Officer Thomas Sleep received over the Brighton Police Radio, nor was there any indication that the bank robber was carrying a gym bag, such as was carried by Mark Curenton. It is my opinion, based on the testimony of Officer Thomas Sleep, Chief of Police Eugene Shaw, Trooper Kim Smith and Sgt. Frank Murray, that a reasonable and

prudent police officer could not have a valid suspicion as a reasonable or prudent police officer that either Mark Curenton or Edward Murtagh Dempsey were involved in the bank robbery, and I believe that there was no probable cause to question, stop, detain or arrest either Mark Curenton or Edward Murtagh Dempsey.

ARREST

The excerpts of deposition testimony of Mark Curenton, Chief of Police Eugene Shaw, Officer Thomas Sleep, Officer Robert Hickey, Officer Frederich Mellini and Sgt. William LaRonde, indicate that Officer Thomas Sleep stopped Edward Murtagh Dempsey and Mark Curenton at gun point and without having

timely or proper backup in place at the time of the initial stop at gun point. Officer Thomas Sleep individually directed Edward Murtagh Dempsey and Mark Curenton to crawl out of the dark blue Toyota and to lie face down on the ground at 1795 Highland Avenue in the City of Rochester, and thereafter not less than three additional Brighton Police Officers, being Officer Robert Hickey, Officer Frederich Mellini and Sgt. William LaRonde, appeared on the scene of the stop by Officer Thomas Sleep, and they also pointed their loaded service revolvers at Mark Curenton and Edward Murtagh Dempsey who were lying on the ground without being told why they were stopped. Officer Robert Hickey handcuffed both Mark Curenton and Edward Murtagh Dempsey. It

appears that neither Mark Curenton nor Edward Murtagh Dempsey posed any threat to Officer Thomas Sleep or other officers of the Brighton Police Department, and that each of them complied promptly and exactly with the orders of Officer Thomas Sleep, and that neither of them were told as to why they were stopped. Again it appears that Mark Curenton did not match up with the radio descriptions broadcast over the Brighton Radio and received by Officer Thomas Sleep as his sole source of descriptions. In particular, the bank robber as shown by the composite drawn by Officer Thomas Sleep was clean shaven, and I understand that on June 12, 1987, the time of the robbery, Mark Curenton had a beard and mustache, and his clothing was entirely different than the

clothing descriptions of the bank robber as broadcast through the Brighton Police Radio. Officer Thomas Sleep should have realized immediately upon his stop that he had the wrong person, but none of the Brighton Police Officers or Officer Thomas Sleep withdrew their service revolvers which were aimed at Mark Curenton and Edward Murtagh Dempsey, and each of these police officers, who I understand had the same descriptions as broadcast over the Brighton Police Radio, should have realized that Officer Thomas Sleep had initiated the arrest of the wrong person without probable cause, but all of the Brighton Police Officers continued to restrain the two innocent persons, who rightfully believed that they were not free to go and were under arrest, without knowing why they were

arrested, although the Brighton Police Officers, including the Chief of Police Eugene Shaw, claims that neither Mark Curenton or Edward Murtagh Dempsey were under arrest, but in fact Edward Murtagh Dempsey and Mark Curenton were not free to go and their right of locomotion was restricted by the Brighton Police officers, and in my opinion both plaintiffs were in fact arrested and those arrests occurred without probable cause.

The statements made by Chief of Police Eugene Shaw, that a person is not under arrest unless a police officer advises him that he is under arrest, is incorrect, for this statement by Chief of Police Eugene Shaw, if true, such would enable any police officer to restrain a persons liberty without just

cause, and by merely failing to say "you are under arrest" would make the 4th Amendment of the United States Constitution meaningless.

In my opinion, if Chief of Police Eugene Shaw believes what he states in his deposition, he does not have a correct understanding of the law of arrest, for he must know, because of his training and experience as a police officer, that a person can be arrested when his freedom to leave is restricted, particularly in this case when Edward Murtagh Dempsey and Mark Curenton were required and did comply with all orders of Officer Thomas Sleep and were handcuffed and had not less than four loaded service revolvers aimed at them. If Chief of Police Eugene Shaw is instructing the officers who serve under

him that you are not under arrest unless the police officers state that "you are under arrest", is both false and according to my belief is not consistent with the training of police officers as to what constitutes arrest, which indicates that Chief of Police Eugene Shaw should update his own training and should also be required, as a Chief of Police, that his officers be further trained as to the law of what constitutes an arrest. It is my further opinion, that the handcuffing, the holding at gun point by service revolvers, the stopping and detaining, and the arrest of Edward Murtagh Dempsey and Mark Curenton constitutes an excessive use of force, when neither party posed any threat to the police officers, there was no indication that

the bank robber used a weapon, and Officer Thomas Sleep did not follow the correct procedure in securing adequate backup before he executed the stop of Edward Murtagh Dempsey and Mark Curenton at gun point without probable cause.

## SEARCH & SEIZURE

Since both Mark Curenton and Edward Murtagh Dempsey were subjected to the unlawful arrest which was initiated by Officer Thomas Sleep, the Brighton Police Officers, without consent, had no authority to search the car of Edward Murtagh Dempsey or the gym bag of Mark Curenton, and it does not appear that they had consent, all of which would amount in my opinion to an unlawful search and seizure of the property of

Edward Murtagh Dempsey and Mark Curenton.

TAKING ARRESTED SUBJECT BACK TO SCENE OF CRIME BY SGT. WILLIAM LARONDE

Sgt. William LaRonde initiated the return of Mark Curenton to the scene of the bank robbery at the Monroe Savings Bank. Normal police procedures would require that a person who is suspect should be taken back to the scene of the crime occurred within 45 minutes, but not in excess of 1 hour, and it appears that Mark Curenton was taken back to the Monroe Savings Bank after the passing of one hour. In accordance with my training and experience as a police officer, a suspect is to be taken to the police station and placed in a line up with other black men of similar height

and build, and that eye witnesses to a crime would then be brought in and given the opportunity to select the person who matched the identity of the bank robber, if the eye witnesses indicated that one of the persons in the line up as being involved in the crime.

OBSERVATIONS OF BRIGHTON POLICE OFFICERS OTHER THAN OFFICER THOMAS SLEEP

Since the descriptions given over the Brighton Police Radio did not match up with Mark Curenton who was arrested, in my opinion, not only should it have become apparent to Officer Thomas Sleep and other Brighton Police Officers assisting him that they had the wrong persons, and it is believed by me that the other three Brighton Police Officers, identified as Officers Robert

Hickey, Frederich Mellini and Sgt. William LaRonde, should have concluded at the scene upon viewing Mark Curenton, that he could not logically be a suspect because of the descriptions given over the Brighton Police Radio were different than the appearance and clothing of Mark Curenton, including his size, height, stature, that Mark Curenton was not clean shaven, and I understand that Mark Curenton had a beard and mustache, and the only similarity between the bank robber and Mark Curenton was the fact that both were black.

## CONCLUSION

My conclusion is that since the Town of Brighton appears to have a large black minority, that black men are often

seen standing, walking and driving in the Town of Brighton which activities are not uncommon; that neither Mark Curenton as a black person nor Edward Murtagh Dempsey as a white person appeared to have engaged in any unlawful activity or activities to create a suspicion by a reasonable and prudent police officer that either of them were involved in the robbery of the Monroe Savings Bank on June 12, 1987. I believe, based on the facts and papers given to me for examination, that a reasonable and prudent police officer would not have stopped, detained or arrested Mark Curenton or Edward Murtagh Dempsey, who I believe were in fact arrested without probable cause, and it is my opinion that Officer Thomas Sleep did in fact initiate the stop, the

detention, and the arrest in this case, and that probable cause does not appear to exist.

It is my further opinion that the drawing of weapons by the Brighton Police Officers, being their service revolvers, which may be six in number, and the handcuffing of the two plaintiffs and requiring them to lie on the ground without explaining to them as to why they were even stopped, constitutes "excessive use of force" in this case, since Edward Murtagh Dempsey and Mark Curenton did not pose a threat to any of the Brighton Police Officers, and Officer Thomas Sleep executed his stop of Edward Murtagh Dempsey and Mark Curenton individually without having proper backup in place.

It is my opinion that since there

was an arrest of both Edward Murtagh Dempsey and Mark Curenton based on the facts and the papers which have been given to me for examination to render this opinion, I believe that without the consent of Edward Murtagh Dempsey, police officers having been involved in an unlawful arrest did not have the right, without consent of Edward Murtagh Dempsey, to search the automobile of Edward Murtagh Dempsey or the gym bag of Mark Curenton.

I also believe, in accordance with my opinion, that if Officer Thomas Sleep planned to stop, detain or arrest the two black men who were driving in the City of Rochester in a Crysler K Car, he should have called for backup, and usually according to my experience, he could have called for backup through the

City of Rochester Police Department, who I believe would have responded promptly to a request of Officer Thomas Sleep for backup.

DATED: January 26, 1990

ss/Peter L. Giorgione
Peter L. Giorgione

(2)

No. 91-366

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1991

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MARK S. CURENTON; EDWARD MURTAGH DEMPSEY,
*Plaintiffs,*

EDWARD MURTAGH DEMPSEY,
*Petitioner,*

*vs.*

TOWN OF BRIGHTON; EUGENE SHAW, CHIEF OF POLICE OF THE TOWN OF BRIGHTON; TOWN OF BRIGHTON POLICE DEPARTMENT; Officers THOMAS SLEEP, ROBERT E. HICKEY, FRED J. MELLINI; SERGEANT WILLIAM LARONDE; DOES 1 THROUGH 6,
*Respondents.*

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the court below correctly uphold the District Court's determination that: respondent's 13-minute detention of petitioner was reasonable; the amount of force used in effecting the detention was reasonable; petitioner failed to establish any basis for municipal liability; and the individual officers were entitled to qualified immunity?

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IN THE SUPREME COURT OF THE UNITED STATES

MARK S. CURENTON; EDWARD MURTAGH DEMPSEY,
*Plaintiffs,*

EDWARD MURTAGH DEMPSEY,
*Petitioner,*

*v.*

TOWN OF BRIGHTON; EUGENE SHAW, CHIEF OF POLICE OF THE TOWN OF BRIGHTON; TOWN OF BRIGHTON POLICE DEPARTMENT; OFFICERS THOMAS SLEEP, ROBERT E. HICKEY, FRED J. MELLINI; SERGEANT WILLIAM LARONDE; DOES 1 THROUGH 6,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## RESPONDENTS' BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

### *Preliminary Statement*

Plaintiffs Mark Curenton and Edward Dempsey commenced these actions pursuant to 42 U.S.C. §1983 alleging that their 13-minute detention by respondents, who believed them to have been involved in a bank robbery, violated their civil rights.

### *The Detention*

At 1:32 p.m. on the afternoon of June 12, 1987, a black man entered the Monroe Savings Bank on Monroe Avenue, in the Town of Brighton, and handed the teller a note written on a brown paper bag telling her that she should place all of her ones,

fives and tens in the bag. While the robber did not display a weapon, either he or the note stated that he was armed. The teller then placed money in the bag and the robber left the bank on foot. When last seen, he was walking out of the bank on foot and appeared to be headed westerly toward the City of Rochester.

The robbery took place over a brief period of time, approximately two minutes. The robber was observed primarily by the teller from whom he demanded the money. Another teller and the supervising teller also viewed him briefly. The bank notified the Brighton Police Department of the incident, and it responded immediately. The initial description broadcast to Brighton Police units on patrol described the robber as "a young black male wearing a blue jacket, unknown if a weapon was shown. Last seen heading towards the city on foot on Monroe Avenue." (A 79[1])

Subsequently, another description broadcast over the radio reported that the suspect was wearing a blue hat, dark glasses, a long-sleeved burgundy shirt and blue jeans. (A 79) A third description reported that the suspect was six feet tall, of slim build, wearing a long-sleeved purple shirt, blue jeans, a tan hat with a chin strap, and sunglasses. The dispatcher noted that a gun was threatened, but not displayed. (A 80-81)

Brighton Police Officer Thomas Sleep, a seventeen-year veteran with the force, was assigned to patrol the area near the bank in search of the bank robber. At approximately 2:29 p.m. he was driving westerly on Monroe Avenue and was stopped in traffic in the passing lane approximately four car lengths east of the traffic light at Monroe Avenue and Highland Avenue. This location is a few blocks from the bank.

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[1] References are to the appendix to the petition.

As he was waiting, Officer Sleep saw a black man, who was about six feet tall and who was wearing blue clothing and glasses, cut through low bushes and get into a blue Toyota which was pulled up to the curb. The man was carrying a bag. The vehicle then proceeded westerly and turned northeast at the next intersection, onto Highland Avenue.

Officer Sleep radioed to the dispatcher that he had just seen a male subject jump into a car on Highland Avenue, and that the suspect was wearing blue. He asked whether the robber had been wearing "dark glasses," and was advised that the robber was wearing sunglasses. Officer Sleep then stated that he intended to stop the vehicle. (A 81-82)

Officer Sleep turned on his flashing lights, and the vehicle pulled to a stop. Based on his belief that the suspects might be armed, Officer Sleep followed felony-stop procedures which the Brighton police are trained to employ in potentially violent situations. He exited his vehicle and, crouching behind the driver's side door, aimed his service revolver at the vehicle. Shortly thereafter, Officer Robert Hickey arrived and pulled his vehicle in behind Officer Sleep's vehicle. Officer Hickey then exited his car and pointed his gun at the suspects' vehicle.

Officer Sleep ordered the driver to throw his car keys out the driver's side window and ordered both men to put their hands on the windshield, which they did. He then ordered the passenger, Mark Curenton, to crawl out the passenger door and lie face down on the grass between the sidewalk and the curb, which he did. Officer Sleep then directed the driver, Edward Dempsey, to do the same, which he did.

Officer Hickey holstered his weapon as he approached the suspects, who were lying face down on the grass, arms and legs

spread. During this period, Dempsey was yelling that he knew the Brighton Town Supervisor personally and wanted to talk to him.

Officer Mellini arrived as Officer Hickey was handcuffing Dempsey. Officer Mellini drew his weapon and pointed it at the suspects briefly. He holstered his gun as he approached the suspects to assist in the handcuffing process. Sergeant LaRonde arrived as the suspects were being handcuffed.

Officer Hickey followed his usual procedure in handcuffing the suspects: he directed one hand behind the subject's back, placed a handcuff on the wrist, then instructed the subject to bring his other arm around, then handcuffed the second wrist. Dempsey claims that Officer Hickey purposely stepped on his hand during this process. Officer Hickey does not recall any physical struggle on the part of the suspects and does not recall stepping on Dempsey's hand. Nor do the other officers recall him stepping on Dempsey's hand. Officer Mellini assisted Officer Hickey in handcuffing Curenton.

Officers Hickey and Mellini then helped the suspects to their feet and conducted a pat-down search of each suspect. Once the search had revealed that the suspects were unarmed, the handcuffs were removed. There were no weapons directed at the suspects at this time.

The officers estimate that the suspects had guns pointed at them for approximately two to three minutes, and that the suspects were handcuffed for less than one minute. Dempsey acknowledges that the guns were holstered within seconds of his being handcuffed. He estimates he was handcuffed for about ten minutes.

Sergeant LaRonde then ordered Officer Mellini to take Curenton back to the bank for a show-up identification. He did so based on the information provided by a witness to a police inves-

tigator at the bank that a white man had jumped into a small blue car[2] and sped away quickly from the area of the bank at approximately the time of the robbery, and the fact that Curenton matched the general description of the bank robber.

Officer Mellini then transported Curenton to the bank, approximately two to three blocks away, where the bank tellers viewed him through the bank's plate glass window and advised the police that he was not the perpetrator of the robbery. Curenton was not handcuffed when he was transported to the bank. Officer Mellini then drove Curenton back to Dempsey's vehicle, and Dempsey and Curenton were released.

Following the negative identification, the officers apologized and advised the suspects that they had been stopped because Curenton matched the description of a bank robber. Furthermore, they explained that they had followed felony-stop procedures for the safety of the officers and the suspects. Officer Hickey gave Dempsey his card and told petitioner to have his boss call him if he was late to work. After the defendants apologized, Dempsey smiled and told the officers that he had been scared at first, but that he had received rougher treatment from his mother. Plaintiffs were detained for 13 minutes, from 2:29 p.m. to 2:42 p.m.

Neither plaintiff was physically injured. No crowd gathered at the scene of the detention, and Curenton and Dempsey testified that no one they knew saw them.

Mark Curenton is black, about 6 feet tall and of medium build. At the time of his detention, he was twenty-one years old and was wearing clear-lensed glasses, a baseball shirt with a white body and blue three-quarter length sleeves, burgundy or gray pants and sneakers. Curenton testified that, at the time of the detention, he was waiting for Dempsey, who drove him to work. While

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[2] Dempsey is white and drives a four-door blue Toyota compact.

he was waiting, State Police Trooper Kim Smith and State Police Sergeant Frank Murray observed Curenton at the corner. Each concluded that he did not match the description he or she had heard and therefore decided not to question him. They did not see Curenton get into a blue car.

Sergeant Murray and Trooper Smith received descriptions of the bank robber over the Monroe County Emergency Communications frequency. They did not receive the Brighton Police frequency.

Sergeant Murray also observed the defendants' detention of Curenton and Dempsey. He did not participate or assist in the stop because he believed the defendants had the situation under control.

Approximately two months later, Franklin Leonard confessed to having committed the June 12, 1987, Monroe Savings Bank bank robbery. Leonard is now in prison.

***Training and Supervision***

Plaintiffs also alleged that the Brighton Police Department negligently trained and supervised the respondent officers. In support of their cross motion for summary judgment, respondents established that the felony-stop procedures followed by the defendants were consistent with their departmental training and the training of the New York State Division of Criminal Justice Services Bureau of Municipal Police.

Each member of the Brighton Police Department has been trained at a police academy or the Criminal Justice Training Center and instructed on the fundamentals of New York Criminal Procedure Law, Penal Law, arrest and detention standards and procedures, use of force, and a wide variety of related topics. This training is consistent with the training provided by the New

York State Division of Criminal Justice Services Bureau of Municipal Police.

Additionally, all Brighton police officers receive ongoing, in-service training and may attend further intensive training on such subjects as use of firearms and deadly physical force, use of radar, criminal investigations, and numerous other subjects. Each officer is also provided with the general orders of the Brighton Police Department, which are updated regularly and address a broad range of topics. The Department has specific policies and procedures for responding to a bank robbery, arrest and detention and use of firearms.

Further, each officer is required to maintain a notebook of training keys which are published by the Bureau of Operations and Research of the International Association of Chiefs of Police. The training keys include felony vehicle approaches, felony vehicle stops and searching prisoners.

The Department also requires each officer to watch video training tapes produced and distributed by the Criminal Justice Training Center covering such issues as probable cause, searching subjects, handcuffing suspects, stop and frisk, officer safety and eyewitness identification.

Petitioner offered no evidence in support of his contention that respondents' training and supervision was negligent. (A 72)

***Proceedings Below***

At the conclusion of lengthy discovery proceedings, plaintiffs Dempsey and Curenton moved for partial summary judgment on the issues of false arrest and excessive use of force. Respondents cross-moved for partial summary judgment on the issue of negligent training and supervision by the police department. The District Court granted respondents' cross-motion for summary judgment on the issue of negligent training and supervision and,

*sua sponte*, granted summary judgment to all respondents on the issues of false arrest and excessive force and to the individual defendants on the basis of qualified immunity. (A 77-78)

Plaintiff Dempsey (petitioner) appealed Judge Larimer's grant of summary judgment. Plaintiff Curenton did not appeal. The Court of Appeals upheld the District Court decision. (A 2-3)

## SUMMARY OF ARGUMENT

This case does not warrant the granting of a writ of certiorari. Rule 10 of the Rules of the Supreme Court of the United States enumerates some of the considerations which may prompt the Court to grant certiorari. Those reasons include conflicting decisions of the Courts of Appeals; state court decisions on federal questions which conflict with decisions of United States Courts of Appeals or other state courts of last resort; or United States Courts of Appeals' decisions on important federal questions which conflict with established Supreme Court precedent. Petitioner has not established, or even argued, that this case presents any such considerations. It does not. Instead, he argues merely that his case was wrongly decided by the lower courts.

Respondents maintain that the court below properly upheld the District Court's summary judgment in favor of respondents, and there is no reason which would warrant the granting of certiorari in this case.

## ARGUMENT

## THE WRIT SHOULD BE DENIED

## THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT SINCE THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS

### I.

### PETITIONER'S DETENTION FOR INVESTIGATIVE PURPOSES WAS REASONABLE

An investigative detention which is limited in scope and includes the transportation of the suspect to the nearby crime scene for identification is lawful where the police believe the suspect matches the description of the perpetrator and diligently pursue investigation in a reasonable manner. *United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

In *United States v. Sharpe*, this Court explained the policy considerations involving investigative detentions as follows:

> [W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

*Id.* at 685, 84 L. Ed. at 615 (citations omitted). Furthermore, this Court has admonished courts not to "indulge in unrealistic second guessing" about whether an arrest occurred or should have occurred when "the police are acting in a swiftly developing situation." *Id.* at 686, 84 L. Ed. 2d 605, 616 (1979).

The police officers who detained petitioners were entitled to rely on the description of the suspect which had been broadcast over the police radio in stopping the suspects for the purpose of identification. *United States v. Hensley*, 469 U.S. 221, 83 L. Ed. 2d 604 (1985). The broadcast descriptions of the bank robber included a young, black male, approximately six feet in height, of slim build, wearing a blue jacket or long-sleeved burgundy shirt, sunglasses, and a blue or tan hat. Curenton is approximately six feet tall and of medium build, was 21 years old and wearing a shirt with blue sleeves and glasses, and was carrying a bag. Furthermore, Officer Sleep testified that he observed Curenton emerging from bushes within a few blocks of the bank and getting into a car, which then drove away.

While Curenton did not match any of the descriptions exactly, he met the general description. Moreover, the descriptions varied considerably and eyewitness descriptions are known to be of questionable reliability. Based on his experience that there is frequently an additional individual in a getaway car, Curenton's actions and appearance, and his close proximity to the bank within one hour of the robbery, Officer Sleep's detention of the plaintiffs was based on reasonable suspicion.

Moreover, respondents acted quickly to confirm or dispel their suspicions. An investigative detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). This Court has held that there is no rigid time limitation which converts an investigative detention, as defined in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), into an arrest. *United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

Thus, in *United States v. Sharpe,* the Court concluded that a 20-minute investigative detention was not unreasonable. The Court noted that the defendants "diligently pursued a means of investi-

gation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686, 84 L. Ed. 2d at 616.

As the courts below held, respondents reasonably detained Dempsey and Curenton only as long as was necessary to confirm that they were not involved in the Monroe Savings Bank robbery, at which time they were immediately released. These circumstances gave rise to no issues of law which merit review by this Court.

## II.

## RESPONDENTS USED REASONABLE FORCE IN EFFECTING THE STOP

In order to establish a Fourth Amendment excessive force claim, petitioner must show that the force used by the respondent officers was, in light of the facts and circumstances confronting them, objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 453 (1989). This Court has held that

> the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *** The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

*Graham v. Connor*, 490 U.S. at 396-397, 104 L. Ed. 2d at 455-456.

The test is an objective one: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. at 397, 104 L. Ed. 2d at 456. A proper assessment of whether the force used was excessive

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

*Graham v. Connor,* 490 U.S. at 396, 104 L. Ed. 2d at 455.

The Courts of Appeals have recognized that it is reasonable for a police officer to draw his gun while approaching a vehicle whose occupant may be an escaping armed felon. *United States v. Jackson*, 652 F.2d 244 (2d Cir. 1981), *cert. denied*, 454 U.S. 1057, 70 L. Ed. 2d 594 (1981); *United States v. Manbeck*, 744 F.2d 360, 377 (4th Cir. 1984), *cert. denied sub nom. O'Hare v. United States*, 469 U.S. 1217, 84 L. Ed. 2d 342 (1985); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987), *cert. denied*, 482 U.S. 916, 96 L. Ed. 2d 679 (1987). As stated by Judge Van Graafeiland in *United States v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982):

> [T]here is no hard and fast rule concerning the display of weapons. ... What might be unreasonable when an officer merely suspects that a minor offense has been committed is not unreasonable when, as here, officers have reason to fear that a suspected criminal is armed. The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect to the approach of police are all facts which bear on the issue of reasonableness.

Such a show of force does not raise an investigative detention to the level of an arrest. In *United States v. Jackson*, 652 F.2d 244, 249-250 (2d Cir. 1981), the Court of Appeals explained that:

> [T]o allow such protective measures to transform an investigative stop into an arrest would create a dangerous dilemma for the police officer in those situations, like this one, where suspicion does not rise to the level of probable cause. If the officer approaches a suspected robber with his gun still in his holster, he increases the risk that he will be shot. If, on the other hand, he protects himself by drawing his gun, he

> increases the risk that a court will set the criminal free by construing his action as an illegal arrest.

The Court concluded that it would be unreasonable to require police officers to take such unnecessary risks. Furthermore, it should be noted that, in the present matter, respondents holstered their guns as soon as the pat-down searches of the suspects were completed and it was determined that the suspects were not armed.

Ancillary to the statutory right to detain is an officer's authority to frisk a suspect if he reasonably suspects that he is in danger of physical injury. *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 910 (1968); *United States v. Jackson*, 918 F.2d 236 (1st Cir. 1990). Furthermore, the Courts of Appeals have held that the use of handcuffs does not raise an investigative detention to the level of an arrest. *United States v. Glenna*, 878 F.2d 967 (7th Cir. 1989) (no arrest where the suspect was handcuffed for 10-15 minutes while the police searched his vehicle); *United States v. Bautista*, 509 F.2d 675 (9th Cir. 1975) *cert. denied sub nom. Monsivais v. United States*, 421 U.S. 976, 44 L.Ed. 2d 467 (1975); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983). Thus, it is clear that the fact that petitioner was handcuffed only briefly for the purpose of ensuring officer safety does not mean that he was under arrest.

This incident represents an unfortunate case of mistaken identity. Respondents stopped Dempsey and Curenton in the reasonable belief that Curenton matched the eyewitnesses' descriptions broadcast over the police radio, and pursued a minimally intrusive investigation intended to confirm or dispel suspicion quickly, while protecting their own safety. Respondents followed accepted procedures in conducting the detention, and were thus able to release Dempsey and Curenton in less than 20 minutes, having ensured that no one was hurt and that the two were not, in fact, involved in the bank robbery. The determination of the

lower courts that respondents' detention of the petitioner was reasonable did not involve any novel issues of law, and there is no reason for the matter to be considered by this Court.

## III.

## PETITIONER FAILED TO ESTABLISH ANY BASIS FOR MUNICIPAL LIABILITY

This Court recently held that:

> [T]he inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact.

*City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 426 (1989) (emphasis supplied). Furthermore, the Court held that in any case alleging municipal liability under Section 1983, there must be a direct causal link between the municipal policy or custom and the alleged constitutional deprivation. *Id.* Proof of causation is required because a municipality can be held liable under Section 1983 *only* when the municipality itself *causes* the constitutional violation at issue. "Respondeat superior or vicarious liability will not attach under §1983." *Id.* at 385, 103 L. Ed. 2d at 424 (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978)).

In other words, "a municipality can be liable under §1983 *only* where its policies are the *moving force* behind the constitutional violation." *City of Canton, Ohio v. Harris*, 489 U.S. at 389, 103 L. Ed. 2d at 427, *quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 56 L. Ed. 2d 611 (1978), and *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509 (1981) (emphasis supplied). Recovery from a municipality is thus limited to acts "of the municipality", that is, acts which the municipality has officially sanctioned or ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452 (1986).

In the course of this litigation petitioner deposed thirteen individuals and served five sets of interrogatories and three notices to admit. He also obtained copies of respondents' relevant personnel files. Nevertheless, petitioner was unable to show *any* departmental custom or policy which would cause or condone civil rights violations.[3] On the contrary, as noted by the District Court, the department maintains an extensive training program. (A 69-70n.)

Moreover, in support of his claim, petitioner cites merely this single incident. However, single acts or isolated incidents are insufficient as a matter of law to establish the "official policy requisite to municipal liability under §1983." *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L. Ed. 2d 791 (1985).

Since petitioner failed to furnish any evidence of a municipal policy or practice of deliberate indifference and causation, the court below properly upheld the dismissal of petitioner's claims of negligent training and supervision. The determinations below relied on uncontroversial principles established by decisions of this Court and do not merit review.

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[3] Contrary to petitioner's contention, Use of Force Reports are maintained by respondents, but none were filed since no force was employed in this detention other than the display of weapons. The magistrate reviewed petitioner's contention in this regard and reasonably concluded that if no Use of Force Reports existed regarding this incident, then none needed to be produced.

## IV.

## THE INDIVIDUAL OFFICER RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

Municipal employees are shielded from personal liability where the employee's conduct has not violated established legal standards:

> Government officials performing discretionary functions are shielded from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed 2d 396 (1982). Even where the law is "clearly established" and the scope of an official's permissible conduct is "clearly defined," the qualified immunity defense also protects an official if it was "objectively reasonable" for him at the time of the challenged action to believe his acts were lawful. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039-40, 97 L. Ed 2d 523 (1987) (explaining *Harlow v. Fitzgerald*, 457 U.S. at 800, 102 S. Ct. at 2727); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987).

*Warren v. Dwyer*, 906 F.2d 70, 74 (2d Cir. 1990), *cert. denied*, __U.S.__, 112 L. Ed. 2d 414 (1990). Thus, the individual defendants are entitled to qualified immunity on two grounds: their conduct was objectively reasonable, and it did not violate "clearly established" rights. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990).

As the District Court held, the respondent officers acted reasonably, and in accordance with Fourth Amendment standards, in detaining Dempsey to investigate the robbery at the Monroe Savings Bank.

Officer Sleep stopped the plaintiff in the reasonable belief that Curenton matched the description broadcast over the police radio. Respondents then pursued a minimally intrusive investiga-

tion intended to confirm or dispel suspicion quickly, while protecting their own safety. These actions were objectively reasonable.

Significantly, a New York Court of Appeals decision rendered approximately one year before this incident specifically authorized such a detention and a prompt show-up identification for the purpose of investigating a robbery and a prompt show-up identification. *People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986). The officers are therefore also entitled to qualified immunity because their conduct did not violate any "clearly established" legal rights.

Accordingly, the court below properly upheld the dismissal of the claims against the individual officers on the basis of qualified immunity.

## V.

## THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT

Summary judgment is properly granted when there is no genuine issue as to any material fact and when, based upon facts not in dispute, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 273 (1986).

This Court has held that a district judge may search the record and grant summary judgment where appropriate:

> [T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of this summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ....

*Id.* at 323-24, 91 L. Ed. 2d at 274. Furthermore, "the District

Courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326, 91 L. Ed. 2d at 275.

The rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed." *Id.* at 251, 91 L. Ed. 2d at 202, quoting *Improvement Co. v. Munson*, 14 Wall 442, 448, 20 L. Ed. 867 (1872).

In this case, petitioner himself moved for summary judgment, arguing that there were no material issues of fact regarding his detention. Petitioner was aware that he should present all his evidence to the court and, in fact, provided the court with not only his initial moving papers, but three supplemental affidavits and numerous exhibits.

Petitioner now selectively claims that certain facts are disputed. Petitioner argues that there are no disputed facts as to whether the detention constituted an arrest without probable cause, and whether excessive force was used, but maintains that "in all other respects" there remain issues of fact. (Petition, p. 48). He argues that there are credibility issues (*id.* pp. 28-29, 55) and makes various other references to tangential and irrelevant "disputed" facts such as whether or not Officer Sleep followed petitioner before detaining him (p. 40) or whether Officer Hickey deliberately stepped on petitioner's hand in the process of handcuffing him (p. 37).

Petitioner cannot have it both ways. These allegedly disputed facts all relate to the issues of the reasonableness of the detention

and the amount of force used, *the very issues on which petitioner moved for summary judgment*. Moreover, even if petitioner's version of events were accepted, he cannot establish any violation of his civil rights.

It is undisputed that Dempsey was detained for less than 20 minutes because Mark Curenton matched the general description of the robber of the Monroe Savings Bank. Furthermore, it is undisputed that the officers directed their guns at the suspects briefly, handcuffed them and searched them for weapons.

Petitioner claimed that one of the officers intentionally stepped on his hand while handcuffing him. While the officer does not recall doing so, as the District Court held, even if the officer inadvertently stepped on petitioner's hand, such an act did not constitute use of excessive force. (See footnote 4 of the District Court opinion published at 749 F. Supp. 1215, 1225; the footnote was omitted from petitioner's appendix.)

Finally, petitioner failed to submit any evidence that his allegedly unconstitutional arrest was the product of a police department policy or practice. While he made various claims as to variances from the Department's policies and training, they are immaterial. Such a failure requires the grant of summary judgment on behalf of the municipality.

Based on the undisputed facts, petitioner submitted his motion for summary judgment, respondents cross moved, and the District Court reasonably held that summary judgment was appropriate. The Court of Appeals upheld the District Court's ruling, and petitioner's attempts to create genuine and material issues of fact at this late date are disingenuous and do not provide this Court with a basis for granting certiorari.

## CONCLUSION

Petitioner has failed to establish any basis for the grant of certiorari. The Court of Appeals properly upheld the District Court's grant of summary judgment to respondents.

Rochester, New York
September 30, 1991

Respectfully submitted,

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